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G. Alan Tarr

Mary Cornelia Porter

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By G. ALAN TARR* AND MARY CORNELIA PORTER**

Introduction

State court contributions to the development of public policy have been the subject of increasing interest in recent years. Highly visible appellate court decisions involving such subjects as school finance,[1] the "right to die,"[2] exclusionary zoning,[3] and "palimony"[4] have attracted attention to state court decisions and their consequences. Recent studies document the wide-ranging effects of less publicized rulings on the rights of criminal defendants,[5] on the administration of criminal jus-

* Assistant Professor, Department of Political Science, Rutgers University (Camden); B.A., Holy Cross College, 1968; M.A., University of Chicago, 1970; Ph.D., University of Chicago, 1976.

** Professor and Chair, Department of Political Science, Barat College; B.A., Sarah Lawrence College, 1945; M.A., University of Chicago, 1950; Ph.D., University of Chicago, 1970.

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1. *E.g.*, Serrano v. Priest II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); Serrano v. Priest I, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill II, 67 N.J. 333, 339 A.2d 193 (1975); Robinson v. Cahill I, 62 N.J. 473, 303 A.2d 273 (1973). For an overview of this litigation, see Thomas, *Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment*, 48 U. CIN. L. REV. 255 (1979).

2. *E.g., In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). For an overview of this litigation, see Hyland and Baime, In re Quinlan: *A Synthesis of Law and Medical Technology*, RUT.-CAM. L. REV. 37 (1976).

3. *E.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1971), *cert. denied*, 423 U.S. 808 (1975). For an overview of state exclusionary zoning cases, see Harrison, *State Court Activism in Exclusionary Zoning Cases*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 55 (Porter & Tarr eds. 1982).

4. *E.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977). *See* N.Y. Times, Apr. 20, 1979, at 18, col. 1; N.Y. Times, Feb. 22, 1979, § 3, at 1, col. 5; N.Y. Times, Jan. 31, 1979, at 8, col. 15; N.Y. Times, Jan. 9, 1979, at 14, col. 2.

5. Galie, *State Constitutional Guarantees and the Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157 (1979).

tice,[6] and on the protection of tenants and other consumers.[7] Historical surveys demonstrate that, far from being a recent development, state court policymaking has been a standard feature of American law.[8]

Although state court policymaking is by no means novel, the context in which it occurs does change, and these changes may affect its form and character. This article examines the effects of one such contextual change—the development of the "new judicial federalism"—through an analysis of state appellate decisions concerning gender equality. In Part I of this article, we trace the origins of the new judicial federalism, analyze its relationship to earlier forms of judicial federalism, and review the controversy about its implications. In Part II, we survey state courts' constitutional decisions pertaining to gender equality and posit that the new judicial federalism has not promoted state court activism in this field. In Part III, we review state courts' nonconstitutional decisions affecting gender equality and find that through these decisions state courts have made a significant contribution to sexual equality. In the conclusion of this article, we apply the results of this study to understanding the role of state courts in protecting individual rights.

I. The New Judicial Federalism

The relationships between state and federal courts vary over time and over issues. In some areas of the law, such as self-incrimination,[9] state and federal court systems operate quite independently of one another. In other areas, such as establishment of religion[10] and the exclu-

6. *See, e.g.*, Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976).

7. *See* R. KEETON, VENTURING TO DO JUSTICE; REFORMING THE PRIVATE LAW (1969); P. MARTIN, THE ILL-HOUSED: CASES AND MATERIALS ON TENANTS' RIGHTS IN PRIVATE AND PUBLIC HOUSING (1971); Baum & Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM, *supra* note 3; Leflar, *Appellate Judicial Innovation*, 27 OKLA. L. REV. 321, 328-32 (1974).

8. Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977); Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978).

9. For example, in People v. Disbrow, 16 Cal. 3d 105, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), the California Supreme Court chose not to follow Harris v. New York, 401 U.S. 22 (1971) (modifying Miranda v. Arizona, 384 U.S. 436 (1966)).

10. *See, e.g.*, Rhoades v. School Dist., 424 Pa. 202, 226 A.2d 53 (1967) (following Engle v. Vitale, 370 U.S. 421 (1962)). *See generally* A. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS (1977).

sionary rule,[11] the United States Supreme Court provides leadership for state courts. In yet others, such as the regulation of obscenity[12] and the legalization of abortion,[13] state courts have provided direction for federal courts.

For many years, state courts, not federal courts, rendered the final decisions in the vast majority of civil liberties cases.[14] The subsequent extension of the Bill of Rights to the states, greatly accelerated during the Warren Court years, overruled a substantial number of state court holdings and transferred primary responsibility for the protection of individual rights to the federal courts.[15] This development, however, did not totally eclipse state court involvement. State courts have considerable leeway, which they have exercised, in responding to Supreme Court mandates.[16] In addition, state courts have continued to influence the Supreme Court by suggesting constitutional solutions, by pointing out ambiguities in Court rulings, and by impelling the Court to clarify

11. *See, e.g.*, City of Akron v. Williams, 175 Ohio St. 186, 192 N.E.2d 63 (1963) (following Mapp v. Ohio, 367 U.S. 643 (1961)). *See generally* Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC'Y REV. 109 (1973).

12. For example, The Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 218 N.E.2d 668, 271 N.Y.S.2d 947 (1964), provided direction for the variable obscenity doctrine in Ginsberg v. New York, 390 U.S. 629 (1968). *See generally* Kramer & Riga, *The New York Court of Appeals and the United States Supreme Court*, 8 PUBLIUS 75 (1978).

13. For example, People v. Barksdale, 8 Cal. 3d 320, 503 P.2d 275, 105 Cal. Rptr. 1 (1972), provided direction for the Court's decision in Roe v. Wade, 410 U.S. 113 (1973).

14. L. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION ch. 8 (1971). Histories of the Supreme Court record the relative paucity of civil liberties considered by the Court prior to World War II in comparison with those heard by the Warren Court. *See* W. MURPHY, THE CONSTITUTION IN CRISIS TIMES (1972); W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932 (1969); W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932-1968 (1970).

15. Most provisions of the first eight amendments to the United States Constitution were incorporated between 1925 and 1968. *E.g.*, Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (freedom of religion); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause); Wolf v. Colorado, 338 U.S. 25 (1949) (search and seizure); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (trial by jury); Benton v. Maryland, 392 U.S. 784 (1969) (double jeopardy).

16. *See* A. TARR, *supra* note 10; Canon, *supra* note 11; Romans, *The Role of State Supreme Courts in Judicial Policymaking*—Escobedo, Miranda *and the Use of Judicial Impact Analysis*, 27 W. POL. Q. 38 (1974).

and modify its decisions.[17]

The relationship between state and federal courts has recently shifted—a change that is referred to as the "new judicial federalism"[18] and that is marked by Supreme Court deference to state court rulings.[19] Neither fish nor fowl, the new judicial federalism contains elements of both the pre-Warren Court division of responsibilities and the "nationalization" of civil liberties associated with that Court.[20]

The Burger Court is responsible, both directly and indirectly, for the new judicial federalism. It has indirectly encouraged states to base their decisions on their own constitutions by conservative interpretation of the federal Constitution. Between 1972 and 1980, the Court reversed twenty state supreme court decisions that ruled in favor of the individual on federal constitutional grounds.[21] The Court has held that while state courts may not interpret the Bill of Rights more broadly than do the federal courts, "a state is free *as a matter of its own law* to impose greater restrictions on policy than those the Court holds to be necessary on Federal constitutional grounds."[22] When state courts have done so, the Court has consistently refused to review these decisions, even when the language of state and federal documents is identical or substantially similar.[23] Thus, the Court has clearly indicated that state courts can insulate more protective civil liberties rulings from Supreme Court review by basing them on state constitutional guarantees.

17. *See* Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945 (1964); Karst, Serrano v. Priest: *A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720 (1972); Kramer & Riga, *supra* note 12.

18. *See, e.g.*, Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1193 (1977). For discussions of the new judicial federalism, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Collins, *Away From a Reactionary Approach to State Constitutions*, 9 HASTINGS CONST. L.Q. 1 (1981); Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123 (1977); Falk, *Foreword: The State Constitution—A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 874 (1976); Welsh & Collins, *Taking State Constitutions Seriously*, 14 THE CENTER MAGAZINE 6 (1981); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976); Note, *The New Federalism: Toward A Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

19. *See, e.g.*, Gustafson v. Florida, 414 U.S. 260 (1973); Miller v. California, 413 U.S. 17 (1973). For a contrast between the Warren and Burger Courts' rulings in criminal justice cases, see L. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE (1974).

20. *See* notes 13 & 15 *supra*.

21. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 389 n.42 (1980).

22. Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis added).

23. Linde, *supra* note 21, at 389.

The Burger Court has directly encouraged the use of state court forums by limiting access to federal forums for the adjudication of civil liberties issues. In a series of cases, the Court revitalized the "equitable abstention" doctrine as a barrier to removal from state to federal courts,[24] discouraged federal injunctive relief against the enforcement of state law,[25] instituted limits on federal *habeas corpus* relief,[26] and imposed stricter standing limitations for raising claims in federal courts.[27] Taken together, these rulings have had the effect of shifting responsibility for adjudicating constitutional and other federal claims to state courts.

These decisions and the latitude they offer to state courts do not necessarily undermine individual liberties. Commentators who applaud the new judicial federalism maintain that state courts, relying on state constitutions, can indeed be counted on to step into the breach created by the Burger Court.[28] First, state bills of rights provide a solid framework for judicial activism, and in many instances these guarantees are more precise and detailed than are those contained in the federal Constitution. For example, whereas the First Amendment of the federal Constitution protects generally the "free exercise" of religion[29] and prohibits laws "respecting an establishment of religion,"[30] various state constitutions explicitly forbid religious exercises in public schools and the use of funds for "any sectarian purpose."[31] Second, rights not mentioned in the federal Constitution are included in many state documents. Seventeen states have adopted "little ERA's,"[32] and bills of

24. Younger v. Harris, 401 U.S. 37 (1971).

25. Rizzo v. Goode, 423 U.S. 362 (1976).

26. Stone v. Powell, 428 U.S. 465 (1976).

27. United States v. Richardson, 418 U.S. 166 (1974). For an overview of Burger Court decisions affecting access to the federal courts, see Yarbrough, *Litigant Access Doctrine and the Burger Court*, 31 VAND. L. REV. 33 (1978).

28. *See* notes 8 & 17 *supra*.

29. U.S. CONST. amend. I, § 1.

30. *Id.*

31. "About half the states prohibit the expenditure of public funds for various religious purposes." Force, *State 'Bills of Rights': A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125, 138 (1969). *See also* C. ANTIEAU, P. CARROLL & T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS (1965).

32. State ERA's have been adopted in Alaska, ALASKA CONST. art. I, § 3 (1972); Colorado, COLO. CONST. art. 2, § 29 (1972); Connecticut, CONN. CONST. art. 1, § 20 (1974); Hawaii, HAWAII CONST. art. 1, § 21 (1972); Illinois, ILL. CONST. art. 1, § 18 (1971); Louisiana, LA. CONST. art. 1, § 3 (1974); Maryland, MD. CONST. art. 46 (1972); Massachusetts, MASS. CONST. pt. 1, art. 1 (1976); Montana, MONT. CONST. art. 2, § 4 (1973); New Hampshire, N.H. CONST. pt. 1, art. 2 (1975); New Mexico, N.M. CONST. art. 2, § 18 (1973); Pennsylvania, PA. CONST. art. 1, § 28 (1971); Texas, TEX. CONST. art. 1, § 3a (1972); Utah, UTAH

rights in ten states explicitly protect privacy.[33] Third, even when a category of rights is similar to rights protected under the federal Constitution, some states offer greater protection. For example, whereas the federal Bill of Rights states that "cruel and unusual punishments"[34] may not be employed, the Oregon Constitution requires in addition that those arrested and confined may not be treated "with unnecessary rigor."[35]

Furthermore, state courts are not bound by the same constraints that limit federal court activism. Federal courts must recognize considerations of federalism as a limitation on their decisions;[36] state courts, of course, need not. Moreover, federal court intervention is limited by the justiciability doctrines concerning standing,[37] political questions,[38] and advisory opinions.[39] State courts, on the other hand, tend to award standing generously,[40] intervene in even the most politically sensitive areas,[41] and, in ten states, issue advisory opinions.[42] However difficult

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CONST. art. 4, § 1 (1896); Virginia, VA. CONST. art. 31, § 1 (1971); Washington, WASH. CONST. art. 31, § 1 (1972); and Wyoming, WYO. CONST. art. 6, § 1 (1890).

33. For a survey and discussion of state constitutional provisions protecting privacy, see Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631 (1977).

34. U.S. CONST. amend. VIII, § 1.

35. OR. CONST. art. I, § 13. For analysis and application of the Oregon constitutional provision, see Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981).

36. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 40-44 (1973).

37. United States v. Richardson, 418 U.S. 166 (1974).

38. *See* P. STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS"; A STUDY IN JUDICIAL EVASION (1974).

39. Muskrat v. United States, 219 U.S. 364 (1911).

40. *See* Collins & Meyers, *The Public Interest Litigant in California: Observations on Taxpayers Actions*, LOY. L.A.L. REV. 329 (1977), and cases cited therein; Degnan, *Forward: Adequacy of Representation in Class Actions*, 60 CALIF. L. REV. 705 (1972); Delle, Donne & Van Horn, *Pennsylvania Class Actions: The Future in Light of Recent Restrictions on Federal Access?*, 78 DICK. L. REV. 460 (1970); Note, *State Class Actions*, 27 S.C.L. REV. 87 (1975); Note, *Taxpayers' Suits: A Survey and a Summary*, 69 YALE L.J. 895 (1960).

41. As a former New Jersey justice has noted: "In *Asbury Park v. Woolley* [an early reapportionment case], people raised the political thicket argument contending that we should stay out because the questions were too political, but they should have known better. They should have known that no question was too political for us. . . . Decisions should not change the law every year because there should be some stability; perhaps every five years. But decisions must change the law sometime, because law is largely policy anyway." R. LEHNE, THE QUEST FOR JUSTICE 43 (1978). The book discusses the politics of school finance reform. See also Reitman v. Mulkey, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), in which the California Supreme Court invalidated article one, § 26 of the California Constitution, which was adopted as a result of Proposition 14 on the November, 1964 ballot. Proposition 14, in essence, "not only disabled all branches of the state government from establishing or enforcing open housing policies in the future, but it did so in language suggesting that the 'right to discrimate' is a fundamental right . . . ." Karst & Horowitz, Reitman v. Mulkey*: A Telephase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 41.

it may be to draw the line between "judging" and "legislating," federal courts are expected to refrain from crossing that border. In contrast, "throughout the states," as Justice Linde of the Oregon Supreme Court has observed, "it is taken for granted that large areas of lawmaking are left to the courts."[43]

Considerable support for the new judicial federalism is result oriented, stemming from desperation and last-ditch hope.[44] Since the Burger Court has made clear that it will not continue to expand civil liberty protection under the federal Constitution, the mantle must fall on the only shoulders available. Other support is more process oriented. Justice Linde, for one, asserts that state courts should *always* consult state law before considering a federal question. For example, he maintains that no determination of whether or not a state has violated the due process clause of the Fourteenth Amendment can be rendered until state action has been completed. This occurs only after the court decides whether or not the legislature or the executive has acted in line with state law. The logic of constitutional law, according to Justice Linde, demands that judgment on the federal constitutional questions be postponed until state courts consult their state constitutions.[45]

Some commentators, including judges, have questioned both the wisdom and the propriety of "evading" the jurisdiction of the United States Supreme Court by basing rulings on state constitutions. Two critics of the California Supreme Court[46]—which has recently discov-

The United States Supreme Court affirmed. Reitman v. Mulkey, 387 U.S. 369 (1967). For a general discussion of state court policymaking, see Jacob & Vines, *State Courts and Public Policy*, in POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS ch. 6 (1971). For the view that some state court judges see themselves as active policymakers, see Vines, *The Judicial Role in the American States: An Exploration*, in FRONTIERS OF JUDICIAL RESEARCH (1969).

42. States that permit advisory opinions include Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, and South Carolina. During the school desegregation crisis, Governor Wallace requested opinions from the Alabama Supreme Court as to the constitutionality of closing the schools rather than complying with federal court orders. The response was affirmative.

43. Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972).

44. *See* Brennan, *supra* note 18; Falk, *supra* note 18; *Project Report: Toward an Activist Role for State Bills of Rights*, *supra* note 18. *See also* Justice Marshall's dissent in Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting).

45. Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981) (Linde, J., opinion); Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133 (1970); Linde, *supra* note 21.

46. Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979). See also the dissents of Justice Clark in People v. Ramey, 16 Cal. 3d 263, 277, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637

ered and ardently embraced its own constitution—observe that this reliance provides no protection against the federal government, the "principal repository of power in the nation,"[47] but merely reallocates power from state legislatures and executives to state courts. Further, they believe that this practice is susceptible to abuse. First, it allows state courts to engage in "constitution shopping" to avoid directives from the Supreme Court. Second, the framers of many state constitutions have provided little evidence of their intentions. State legislative history does not place many constraints on state court interpretations. Finally, the critics argue that reliance on state constitutions assumes, with no basis in fact, that the states' interest in diversity outweighs the national interest in uniformity. Indeed, selection of a state constitutional ground, by foreclosing Supreme Court review, precludes uniformity.[48]

Other critics dismiss the new judicial federalism as largely rhetorical. Professor Haas, for one, points out that court concern for individual rights has been conspicuously absent in prisoners' rights cases, an area in which state court judges might be expected to be active.[49] Even in areas of state court activism, such as the protection of privacy rights, only a few courts have realized the potential of the new judicial federalism. Indeed, those most sanguine about the possibilities of state court activism have been able to identify only a handful of courts that have provided more extensive protections than has the United States Supreme Court.[50] Although the activism of these "lighthouse courts" is important, critics maintain that their activism is exceptional and does

(1976), and People v. Norman, 14 Cal. 3d 929, 940, 538 P.2d 237, 245, 123 Cal. Rptr. 109, 117 (1975), and the dissent of Justice Richardson in People v. Disbrow, 16 Cal. 3d 101, 117, 545 P.2d 272, 282, 127 Cal. Rptr. 360, 370 (1976).

47. Deukmejian & Thompson, *supra* note 46, at 975.

48. *Id.*

49. Haas, *The New Federalism and Prisoners' Rights: State Courts in Comparative Perspective*, 34 W. POL. Q. 552 (1981).

50. Professor Wilkes discovered that the courts in only seven states (California, Hawaii, Indiana, Maine, Michigan, New Jersey, and Pennsylvania) gave greater protection than the federal courts in at least two cases. Wilkes, *More on the New Federalism in Criminal Procedure, supra* note 6, *passim*. Professor Howard, *supra* note 18, at 907, 916, 923, discovered that only five courts offered greater protection in the area of religion (Delaware, Idaho, Oklahoma, Oregon, and Wisconsin), three allowed it in the area of education (California, Michigan, and New Jersey), and six allowed it in the area of personal autonomy (Alaska, Idaho, Illinois, Massachusetts, Michigan, and New Mexico). For possible reasons for this limited response to the Supreme Court's invitation to develop state constitutional law, see H. GLICK, SUPREME COURTS IN STATE POLITICS (1971); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Wold, *Political Orientations, Social Backgrounds and the Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239 (1974). *See also* Table A.

not signal a broader state court concern with civil liberties.[51]

II. Gender Equality Litigation and the New Judicial Federalism

The conflicting views of the new judicial federalism mentioned in Part I have important implications for the protection of civil liberties. To test the adequacy of these views, we focus here on federal and state handling of selected gender equality issues. In addition to its intrinsic importance, we have chosen to focus on gender equality for two reasons—one substantive, the other theoretical.

First, the failure of many states to ratify the Equal Rights Amendment,[52] the United States Supreme Court's inconsistent response to gender discrimination claims,[53] and the adoption of state "little ERA's"[54] suggest that state rulings should assume increased significance. Second, most discussions of the new judicial federalism relate to the reliance on state constitutions in reaction to the Burger Court's erosion of protections established by the Warren Court.[55] Under this view, state courts, looking to their own constitutions, have been able to pick and choose among Supreme Court interpretations of similarly worded provisions, "lodging rejected Supreme Court doctrines in state constitutions and law."[56] The Warren Court, however, did not address the question of sex discrimination. Therefore, state decisions that go beyond the rulings of the Burger Court represent independent initiatives. In this respect, gender equality differs from the issues, such as

51. Haas, *supra* note 49. For a critical view of state court capacity to protect civil liberties, see Neuborne, *supra* note 50, at 1130-31.

52. Thirty-eight states must ratify the ERA by June, 1982. Of the 35 that have ratified, Idaho, Kentucky, Nebraska, and Tennessee have rescinded, the constitutionality of which is unclear. The states that have not yet ratified the ERA are: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. For a discussion of the rocky course of ratification, see J. BOLES, THE POLITICS OF THE EQUAL RIGHTS AMENDMENT (1979).

53. The Supreme Court struck down sex-based classifications in Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); and Frontiero v. Richardson, 411 U.S. 677 (1973), but sustained permissible benign discrimination in Schlesinger v. Ballard, 419 U.S. 498 (1975), and Kahn v. Shevin, 416 U.S. 351 (1974), and sustained all-male draft registration in Rostker v. Goldberg, 453 U.S. 57 (1981). For a critical view of the Court's record in sex discrimination cases, see Baer, *Sexual Equality and the Burger Court*, 40 J. POL. 470 (1978). For a more sanguine view, published prior to *Rostker*, see Porter, *Androgyny and the Supreme Court*, 23 WOMEN & POL. 1, 23 (1980-81).

54. *See* note 32 *supra*.

55. Collins, *supra* note 18.

56. Porter & Tarr, *Editors' Introduction*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM xx (1982).

civil liberties, that are typically examined in assessing the new judicial federalism and offers the opportunity to present a fresh perspective. As Table A illustrates, gender activism and civil liberties activism are not necessarily coextensive.

A. The Legal Framework

During the last two decades, state and federal governments have been active in combating gender-based discrimination. At the national level, noteworthy legislation includes the Equal Pay Act of 1963;[57] Title VII of the Civil Rights Act of 1964,[58] which addresses a variety of discriminatory practices in hiring and promotion; and Title IX of the Education Act Amendments of 1972,[59] which prohibits gender discrimination in educational programs and activities receiving federal financial assistance. In *Reed v. Reed*,[60] the Supreme Court invalidated a sex-based classification on Fourteenth Amendment equal protection grounds for the first time. Subsequent rulings, while failing to recognize sex as a "suspect" classification, nevertheless indicated a continuing judicial willingness to scrutinize sex-based classifications.[61] In keeping with these developments at the federal level, fourteen states between 1968 and 1976 ratified state constitutional provisions guaranteeing gender equality,[62] and several states undertook major revisions of their laws to eliminate provisions and language that expressly or effectively discriminated against either sex.[63]

Although these parallel developments suggest a shared responsibility between state and federal courts, the state role is much weaker. Only a handful of states—most notably Pennsylvania, Illinois, Massachusetts, Texas, and Washington[64]—have employed state ERA's to

57. 29 U.S.C. § 206 (1976).

58. 42 U.S.C. § 2000e (1976 & Supp. III 1979).

59. 20 U.S.C. § 1681 (1976). Before Cannon v. University of Chicago, 441 U.S. 677 (1979), which held that Title IX creates a private cause of action, litigants remedying sex discrimination tended to rely on constitutional rather than on statutory grounds.

60. 404 U.S. 71 (1971).

61. In Frontiero v. Richardson, 411 U.S. 677 (1973), Justices Brennan, Douglas, White, and Marshall found sex to be a suspect classification, but Justices Powell, Blackmun, and Chief Justice Burger did not, pending the outcome of the ERA ratification. *Id.* at 692 (Powell, J., concurring).

62. *See* note 32 *supra*.

63. For a listing of states that undertook major revisions of their statutes, see B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW 47-51 (1977).

64. Despite their limited number, the decisions of the Washington courts are important because they "have both preceded and exceeded federal standards" and because the Washington Supreme Court has apparently adopted a stringent absolute test for sex discrimination under its state ERA. Note, *State Equal Rights Amendments: Legislative Reform and*

provide broad protection against sex discrimination.[65] As Table B indicates, state courts have decided relatively few cases on the basis of state ERA's and in many of these cases have merely sustained gender-based classifications against constitutional challenges. Most litigation has been routed into federal courts, and most rulings have been based on federal statutes and on the federal Constitution. As suggested by Table C, this tendency toward federal dominance manifests itself even in fields of traditional state responsibility, such as education. Federal and state litigation pertaining to gender discrimination in interscholastic athletics is illustrative of this tendency.

B. Gender Discrimination in Interscholastic Athletics

Athletic competition has traditionally been a male preserve, evidenced by the great disparity in the extent and quality of interscholastic programs available to male and female athletes. Objections to this disparity have been raised in both federal and state courts. Practices in dispute include: 1) prohibitions against mixed participation on teams in noncontact sports; 2) prohibitions against mixed participation on teams in contact sports; 3) different sets of rules for men's and women's teams competing in the same sport; and 4) "reverse discrimination" suits brought by men seeking to participate on women's teams.

1. Mixed Participation in Noncontact Sports

At the beginning of the 1970's, interscholastic athletic associations, which enrolled virtually all the states' high schools, did not permit mixed team participation.[66] Female plaintiffs sued to prevent the application of rules that often had the effect of denying an opportunity to participate in interscholastic competition in noncontact sports. Where there was no comparable women's team, the federal courts consistently

Judicial Activism, 4 WOMEN'S RIGHTS L. REP. 227, 228, 238 (1978). The limited litigation under the state ERA is largely a product of legislative reform. Following the adoption of the state ERA, the Washington state legislature undertook a major revision of state law to eliminate sex discrimination, thereby removing many bases for litigation. WASHINGTON STATE WOMEN'S COUNCIL, WOMEN AND THE LAW IN WASHINGTON STATE (1977) provides an overview of this legislation.

65. To these gender-active states must be added California, which does not have an ERA but which has recognized sex as a suspect classification. *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

66. The National Federation of State High School Associations at the beginning of the 1970's had advocated that women participate only on women's teams competing against other women's teams. NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 1972-1973 OFFICIAL HANDBOOK 5 (1972). Although the National Federation could not compel compliance by its members, most states had rules consistent with the Federation's guidelines. Note, *The Case for Equality in Athletics*, 22 CLEV. ST. L. REV. 570, 571 (1973).

struck down these rules on constitutional grounds.[67] In the earliest cases challenging exclusion, the courts concluded that the rules, as applied, failed to serve any legitimate purpose. The courts applied the *Reed v. Reed* "rational relationship test," which held that there must be a reasonable nexus between the state's objective and a statute that classifies on the basis of sex.[68] These federal decisions served as precedent for subsequent cases involving female exclusion from competition.

Despite these rulings, dicta in several opinions indicate that the courts would have ruled differently if plaintiffs had the option of participating on a women's team.[69] When this issue was confronted directly, federal courts upheld the constitutionality of separate teams for men and women.[70] Noting performance disparities between top male and female athletes, one court concluded that such differences supported fears that "unrestricted athletic competition between the sexes would consistently lead to male domination of interscholastic sports and actually result in a decrease in female participation in such events," thereby providing a rational basis for separate teams.[71] Relying on similar considerations, another court concluded that " '[s]eparate but equal' in the realm of sports competition, unlike that of racial discrimination, is justifiable . . . ."[72]

State courts have been divided on the constitutionality of barring mixed competition in noncontact sports. The Indiana Supreme Court ruled that if there were no women's team in a sport, a ban on mixed competition was discriminatory, since such a ban would effectively bar female students from competition.[73] Yet a Connecticut appellate court dismissed an appeal of a lower court's refusal to enjoin the Connecticut

67. Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978); Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973); Brenden v. Independent School Dist., 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972).

68. In *Reed v. Reed*, the Court noted, "A 'classification' must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 76.

69. *See, e.g.*, Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1242-43 (D. Kan. 1973); Brenden v. Independent School Dist., 342 F. Supp. 1224, 1233-34 (D. Minn. 1972).

70. *See, e.g.*, Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972).

71. Bucha v. Illinois High School Ass'n, 351 F. Supp. 69, 75 (N.D. Ill. 1972).

72. Ritacco v. Norwin School Dist., 361 F. Supp. 930, 932 (W.D. Pa. 1973).

73. Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972).

Interscholastic Athletic Conference from enforcing rules making cross-country running available to men but not to women.[74] Although the basis for this dismissal was not stated, the trial court justified its ruling by maintaining that mixed-sex competition ignored important physical differences, destroyed the incentive of male athletes to compete, and violated the traditions of the athletic world.[75]

A Pennsylvania court, relying on its own ERA, demonstrated the potential of the new judicial federalism by extending greater protection to women athletes than had the federal courts.[76] Although both state and federal grounds were proposed for overturning a rule that denied equal athletic opportunities to women, the court noted that the state ERA was sufficient for summary disposal of the issue. This amendment, the court held, clearly prohibited exclusion of women from sports in which men can participate. Merely to provide men's and women's teams in a sport, however, would not be sufficient under the ERA, since this might deny the most talented women an opportunity to compete at the level that their abilities would otherwise permit; exclusion of women from the men's team was therefore unconstitutional as well.[77] Under the federal rational basis test, separate-but-equal teams would most likely be permitted; however, because of the more stringent standard under the state constitution, the federal question was never reached.

2. Exclusion of Women From Contact Sports

Although the cases in this category raise issues similar to those previously discussed, their resolution is complicated by the inevitable physical contact on mixed-sex teams and the increased possibility of injury in contact sports. Perhaps because of these considerations, federal courts initially were reluctant to endorse female participation in contact sports, particularly on mixed teams. In two instances, for example, the courts expressly limited their rulings to noncontact sports.[78] More recently, federal courts have consistently ruled that exclusion of women from contact sports in which men are allowed to participate

74. Hollander v. Connecticut Interscholastic Athletic Conference, 164 Conn. 654, 295 A.2d 671 (1972).

75. The trial court's ruling is discussed in Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535, 543 (1974).

76. Packel v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 334 A.2d 839 (1975).

77. *Id.* at 52, 334 A.2d at 842.

78. Morris v. Michigan State Board of Educ., 472 F.2d 1207 (6th Cir. 1973); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973).

violates the Constitution.[79] As one court noted, the risk of injury to women cannot be used to justify their exclusion, since frail men, who undergo the same risk of injury, are not excluded.[80] Only once, however, did a court conclude that qualified women could not be denied equal access to the men's team.[81] In three cases, the courts suggested—generally in dicta—that separate teams in contact sports for women satisfied the constitutional requirement.[82]

State court decisions have gone considerably beyond their federal counterparts. In *Packel v. Pennsylvania Interscholastic Athletic Association*,[83] the Pennsylvania Commonwealth Court noted that although the complainant had specifically exempted football and wrestling, "it is apparent that there can be no valid reason for excepting those two sports from our order in this case."[84] Two subsequent cases followed the *Packel* lead. The Massachusetts Supreme Court stated in an advisory opinion that a statute that would prohibit all participation of women with men in football and wrestling violated the state's ERA.[85] The Washington Supreme Court ruled that a qualified woman could not be excluded from men's teams in either contact or noncontact sports, regardless of the existence of women's teams.[86] After noting that the federal Constitution merely required that gender classifications have a "rational basis," the court observed that it was not bound by federal precedent in the interpretation of analogous state provisions. Earlier decisions interpreting Washington's equal protection clause, the court noted, had established that sex was a suspect classification, which could only be used to promote compelling state interests. Since the later ratification of the state's ERA was intended to have some independent effect, the court held that the provision was meant to impose an even more rigorous standard for evaluating sexual classifications. Viewed in

79. Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978); Yellow Springs Exempted Village School Dist. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976).

80. Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569, 571 (E.D. Tenn. 1976).

81. Yellow Springs Exempted Village School Dist. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753, 758-59 (S.D. Ohio 1978).

82. Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978); Hoover v. Meiklejohn, 430 F. Supp. 164, 170-72 (D. Colo. 1977); Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569, 571-72 (E.D. Tenn. 1976).

83. 18 Pa. Commw. 45, 334 A.2d 839 (1975).

84. *Id.* at 53, 334 A.2d at 843.

85. Opinion of the Justices to the House of Representatives, 374 Mass. 836, 371 N.E.2d 426 (1977).

86. Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

this light, the exclusion of women from sports teams, even in contact sports, could not stand.[87]

3. Different Rules for Women's and Men's Competition

In some states, different rules govern men's and women's competition in the same sport. Litigants have attacked the restrictive rules of women's basketball before federal courts on three occasions. In two decisions, the courts have rejected these challenges, maintaining that the detriment to female players was *de minimis* and that sex-based rules reflected differences in physical characteristics and capabilities.[88] In the other decision, the court upheld such a challenge, asserting that the restrictive rules prevented female basketball players from fully developing their skills, and that there was no substantial relationship between the purported objectives of the rules and the sex-based classification used to achieve those objectives.[89]

4. Reverse Discrimination

Three recent cases have raised the question of whether or not a qualified male has a right to play on an all-female athletic team when the school offers no separate male team. A federal court avoided the constitutional question by construing Title IX to require schools to offer the same athletic opportunities to all students.[90] Courts in both Illinois and Massachusetts addressed the constitutional question, although they differed markedly in their approach to it.

The Illinois court upheld an Illinois High School Association rule prohibiting male participation on a women's volleyball team.[91] Focusing first on the federal constitutional question, the court noted that the Supreme Court's decision in *Craig v. Boren*[92] supplied the applicable standard: Gender-based classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives."[93] The objective of the rule was undoubtedly legitimate: to protect and enhance the athletic opportunities of female athletes. Moreover, the gender classification imposed no stigma on

87. *Id.* at 875, 877-78, 540 P.2d at 891-92.

88. Cape v. Tennessee Secondary School Athletic Ass'n, 563 F.2d 793 (6th Cir. 1977); Jones v. Oklahoma Secondary School Activities Ass'n, 453 F. Supp. 150 (W.D. Okla. 1977).

89. Dodson v. Arkansas Activities Ass'n, 468 F. Supp. 394 (E.D. Ark. 1979).

90. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

91. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979).

92. 429 U.S. 190 (1976).

93. *Id.* at 197.

excluded male athletes, since "there is a long-standing tradition in sports of setting up classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition."[94] On the other hand, since typical physical advantages would permit men to dominate if male participation were extensive, allowing men to compete on the women's volleyball team would diminish the athletic opportunities of female athletes. Although alternative modes of classification might be proposed, only a gender-based classification, the court held, adequately addressed the problem of physical advantage.[95]

Whereas the Illinois court took its bearings primarily from the federal Constitution, the Massachusetts court, which grounded its ruling in the state constitution, held that the state ERA required that gender classifications be subject to the same strict scrutiny that federal courts apply to racial classifications.[96] Appellants in the case argued that the classification merely reflected physical differences, that the exclusion of males safeguarded participants against injury, and that the rule protected women's sports from inundation by male participants. The court countered as follows: Since separation by sex was, at best, an imprecise proxy for differences in size, weight, and strength, the justifications for the rules were inadequate. Appellants' claims rested on a stereotype of female fragility and, further, could not be applied to such sports as swimming and golf. In those sports in which male physical advantages are minimal or nonexistent, fears of male preponderance or domination are unfounded. The male exclusion, the court rather sternly concluded, "represents a sweeping use of a disfavored classification when less offensive and better calculated alternatives appear to exist and have not been attempted."[97]

The cases involving gender discrimination in interscholastic athletics illustrate the possibilities and limitations of the new judicial federalism. The Massachusetts, Pennsylvania, and Washington courts *did* rely on state constitutional guarantees, not only to develop their own standards for evaluating gender discrimination claims, but also to provide more extensive protections for female athletes than those accorded by the federal courts. The Massachusetts Supreme Court based its reverse discrimination decision squarely on the state constitution. Nonetheless,

94. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 988, 394 N.E.2d 855, 861 (1979).

95. *Id.* at 988-89, 394 N.E.2d at 862-63.

96. Attorney General v. Massachusetts Interscholastic Athletic Ass'n, 378 Mass. 342, 393 N.E.2d 284 (1979).

97. *Id.* at 360, 393 N.E.2d at 294.

these cases taken as a whole highlight some of the problems inherent in the new judicial federalism.

First, the existence of applicable state constitutional provisions does *not* guarantee that state courts will base their decisions on those provisions. In the Indiana case, the appellant raised both state and federal claims, but the state supreme court confined its analysis to the federal constitutional issue and concluded, more or less as an afterthought, that the protection afforded by the state constitution was identical to that under the federal provision.[98] In the Illinois case, the Illinois court focused on the federal issue and failed to provide a principled interpretation of its own ERA provision.[99]

Second, despite the protection afforded by state constitutions, litigants have tended to use federal courts and federal constitutional and statutory arguments to litigate their discrimination claims. Of the twenty cases involving gender discrimination in interscholastic athletics, only six were contested in state courts. Indeed, even when the state constitution expressly banned gender discrimination, litigants have twice chosen the federal forum.[100] This tendency to use the federal courts has not diminished with the development of the new judicial federalism; of the cases initiated since 1976, seven out of ten have been commenced in the federal courts. Justice Linde observed the reason: "[T]he habit that developed in the 1960's of making a federal case of every claim and looking for all law in Supreme Court opinions dies hard."[101]

III. Gender Equality Litigation in State Courts

The state courts' constitutional decisions, however, do not tell the whole story. Conclusions that state courts have been civil libertarian laggards are as wide of the mark as are claims that they have been civil liberties activists. Both contentions fail to take note of the day-to-day business of state appellate courts and, by looking at them through a federal prism, reduce them to miniatures of their federal counterparts. This oversimplified picture of state court actions underestimates the range of state court activism and policymaking affecting civil

98. Haas v. South Bend Community School Corp., 259 Ind. 515, 526, 289 N.E.2d 495, 501 (1972).

99. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 996-97, 394 N.E.2d 855, 864-65 (1979).

100. Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972).

101. Linde, *supra* note 21, at 390.

liberties.[102]

State courts are in a position to contribute to the protection of individual liberties in four distinguishable ways. The first and most obvious way is through decisions interpreting state and federal constitutional guarantees. Statutory interpretation provides the second route. Since state constitutions are not grants of power, but are considered limitations on a comprehensive residual governing power,[103] state legislatures often do not need to resort to constitutional amendment to enact policies of constitutional significance affecting individual rights.[104] When states have elected to safeguard rights through broad legislative enactments, state courts have the opportunity to make important contributions to the protection of individual rights by broadly construing general statutory language. For example, in *Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination*,[105] the Massachusetts Supreme Court ruled that a Massachusetts statute forbidding sex discrimination in employment prohibited exclusion of pregnancy-related disabilities from disability benefits. The court construed the state statute to provide protection unavailable under federal constitutional and statutory law.[106] Third, through their power to establish rules of evidence, state supreme courts can have a profound effect on safeguarding defendants' rights in state courts. For example, despite a contrary United States Supreme Court ruling in *Kirby v. Illinois*,[107] the Michigan Supreme Court ruled that defendants in the state were entitled to legal assistance at pretrial line-ups. The court based its decision explicitly on its "constitutional power to establish rules of evidence."[108] Finally, through their development of the common law, state courts make policy that tremendously affects individual liberty. Consortium cases in particular present a striking example of how state courts have, in an unheralded way, promoted the equality of the sexes.

102. For a typology of state supreme court policymaking, see Porter & Tarr, *supra* note 56, at xvi-xviii.

103. *See, e.g.*, Client Follow-up Co. v. Hynes, 75 Ill. 2d 208, 215, 390 N.E.2d 847, 849-50 (1979); State *ex rel.* Schneider v. Kennedy, 225 Kan. 13, 20, 587 P.2d 844, 850 (1978).

104. Press shield laws furnish an example of states using legislation rather than constitutional amendment to enact policies of constitutional significance. For a survey of this legislation, see D. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 183-84 (1981).

105. 375 Mass. 160, 375 N.E.2d 1192 (1978).

106. *Id.* at 165-72, 375 N.E.2d at 1197-1201. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

107. 406 U.S. 682 (1972).

108. People v. Jackson, 391 Mich. 323, 338-39, 217 N.W.2d 22, 27-28 (1974).

A. Recovery for Loss of Consortium

Consortium is defined as the "[c]onjugal fellowship of husband and wife, and right of each to the company, society, co-operation, affection and aid of the other in every conjugal relation."[109] Under common law, husbands were permitted to recover for negligence leading to an impairment or loss of the consortium of their spouses, but wives were not.[110] This disparate treatment of husbands' and wives' claims stemmed from the more general legal inequality of women, reflecting the common law's legal fusion of husband and wife. Since wives were not legally entitled to their husbands' services, it was argued, they could not secure redress for the loss of those services. Despite the criticisms of legal commentators, this remained the ruling doctrine in all states until the 1950's.[111]

The federal Court of Appeals for the District of Columbia provided the stimulus for reconsidering the traditional common law position. It ruled in *Hitaffer v. Argonne Co.*[112] that wives in Washington, D.C. could recover for negligent loss of consortium. The court noted that the common law rule stemmed from an outmoded conception of the marital relationship.[113] In addition, the court observed that most of the practical arguments offered for denying to wives a right to recover—for example, the possibility of double recovery, the indirectness of the injury, and its remote and inconsequential character—applied equally to a right of recovery for husbands. Since these difficulties did not justify denial of a husband's right to recover, they should not block extension of this right to wives.[114] Finally, the court observed that the common law already permitted wives to collect damages for some interferences with the marital relationship, *e.g.*, alienation of affections, and concluded that in light of the "demonstrable desirability" of a change in the rule and the unconvincing justifications for its retention, a wife's right to recover for negligent invasion of consortium should be recognized.[115]

109. BLACK'S LAW DICTIONARY 280 (rev. 5th ed. 1979).

110. For general background on the consortium issue, see Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341 (1961).

111. A North Carolina court did recognize a wife's right to sue for negligent invasion of consortium in Hipp v. E.I. DuPont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921). This decision, however, was explicitly overruled in Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

112. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

113. *Id.* at 816.

114. *Id.* at 815.

115. *Id.* at 819.

The *Hitaffer* decision stimulated considerable litigation aimed at overturning state decisions prohibiting wives from recovering for negligent loss of consortium. Initially, at least, these efforts usually failed. As Table D indicates, during the decade following *Hitaffer*, twenty-four state appellate courts considered consortium claims, but only seven granted wives a right to recover.[116] Most of these courts dismissed the *Hitaffer* opinion as unpersuasive, although none attempted a detailed refutation. Rather, most emphasized that the common law had long ago settled the issue and that the doctrine of *stare decisis* required adherence to the common law rule.[117] In this regard, they noted that few state courts had immediately endorsed *Hitaffer* and used this lack of acceptance to buttress their contention that the common law was not in doubt.[118] In addition, some courts insisted that recognition of a wife's right to recover would introduce serious practical problems.[119] Other courts concluded that the notion of damages for loss of consortium, whether awarded to wives or to husbands, was altogether outmoded.[120] Finally, several courts emphasized that the limitations of the judicial function precluded such "judicial legislation" and asserted that the legislature should institute whatever change was required in the traditional doctrine.[121]

Over time, more courts adopted the *Hitaffer* position, and the justifications offered for the traditional rule faded. Nonetheless, some courts continued to insist that the weight of authority supported denial of wives' claims to recover.[122] Other courts maintained that factors

116. For denial of consortium claims, see Table D under Alabama, Arizona, California, Colorado, Connecticut, Florida, Kentucky, Maryland, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, Texas, Washington, and Wisconsin.

For recognition of consortium claims, see Table D under Arkansas, Georgia, Illinois, Iowa, Michigan, Oregon, and South Dakota.

117. In Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (1954), for example, the Arizona Supreme Court noted, "[W]e have no right to remake the common law as was attempted in Hitaffer v. Argonne Co. . . ." *Id.* at 228, 269 P.2d at 724. *See also* note 128 *infra*.

118. *See, e.g.*, Smith v. United Constr. Workers, 271 Ala. 42, 122 So. 2d 153 (1960); Coastal Tank Lines, Inc. v. Canoles, 207 Md. 37, 113 A.2d 82 (1955).

119. *See, e.g.*, Deshotel v. Atchison, Topeka & Santa Fe Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958).

120. *See id.*; Neuberg v. Bobowicz, 401 Pa. Super. 146, 162 A.2d 662 (1960).

121. *See, e.g.*, Smith v. United Constr. Workers, 271 Ala. 42, 122 So. 2d 153 (1960); Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952); Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App. 1954); Nickel v. Hardware Mut. Casualty Co., 269 Wis. 647, 70 N.W.2d 205 (1955).

122. *See* Table D under Kansas, Maine, Minnesota, Mississippi, New Mexico, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wyoming.

peculiar to their state required retention of the traditional rule. The West Virginia Supreme Court of Appeals, for example, noted that the state constitution incorporated common law and interpreted this to mean that it was obliged to uphold established common law principles unless they were modified by the legislature.[123] Still other courts maintained that the unavoidability of double recovery and other practical problems justified their refusal to extend to wives a right to recover.[124] Finally, several courts, noting the division of opinion, concluded that since the proper resolution of the issue was in doubt, the legislature should decide whether or not a change in the law was warranted.[125] This deference to legislative authority, often combined with extravagant professions of judicial modesty, is a recurring theme in the decisions after 1960 that rejected the extension of a right to recover.[126]

The seven state appellate courts that recognized a wife's right to recover for negligent loss of consortium in the decade following *Hitaffer* relied heavily on the analysis in that decision. Indeed, one court included almost seven pages of *Hitaffer*, verbatim, in its opinion.[127] Several courts that rejected *Hitaffer* acknowledged the desirability of its holding but professed to be bound by precedent. Therefore, these seven courts are distinguished by their willingness to abandon the common law rule.[128] Whereas most courts viewed the common law as dispositive, these courts claimed that their paramount responsibility was "to do justice, not to perpetuate error."[129] Whereas most courts maintained that any change in the law should come from the legislature, these courts insisted that an "essential function" of the courts is "re-

123. Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962).

124. *See, e.g.*, Hoffman v. Dautel, 192 Kan. 406, 388 P.2d 615 (1964); Roseberry v. Starkovitch, 73 N.M. 211, 387 P.2d 321 (1963).

125. *See, e.g.*, Potter v. Schafter, 161 Me. 340, 211 A.2d 891 (1965); Bates v. Donnafield, 481 P.2d 347 (Wyo. 1971).

126. *See, e.g.*, Karriman v. Orthopedic Clinic, 488 P.2d 1250, 1251 (Okla. 1971) ("We feel that we should follow Oklahoma precedent and are of the view that if the present policy in dealing with the problem before us is to be changed it should be done by the legislature, as representatives of the people, and not by this court"); Bates v. Donnafield, 481 P.2d 347, 349 (Wyo. 1971) ("We think it far more salutary and in the overall more equitable that the common law which we have adopted in this jurisdiction be changed by legislative enactment").

127. Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953).

128. State appellate judges have, in both opinions and other writings, expressed widely divergent views about the respect that should be accorded to precedent. *See* Cameron, *The Place for Judicial Activism on the Part of a State's Highest Court*, 4 HASTINGS CONST. L.Q. 279 (1973); Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563 (1976); Leflar, *supra* note 7; Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966); Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211 (1968).

129. Montgomery v. Stephan, 359 Mich. 33, 38, 101 N.W.2d 227, 229 (1960).

evaluating common-law concepts in the light of present-day realities."[130] The Michigan Supreme Court forthrightly summarized the view of the judicial function that united the courts endorsing *Hitaffer* and separated them from their sister courts. "We are remitted, then, to a matter of sound judicial policy, a decision to be reached in the light of today's society and the current common law solution of comparable problems."[131]

The last two decades have witnessed a major shift in state courts' receptiveness to wives' consortium claims. Six courts reversed earlier rulings as a result of legislative action granting a right of recovery to wives.[132] Three others extended this right themselves, following ratification of "little ERA's" in their states.[133] Finally, courts in eleven states, addressing the issue for the first time since *Hitaffer*, ruled that the common law permits a right of recovery;[134] courts in ten other states reversed earlier decisions to endorse that position.[135]

This shift reflected a change in perspective that, once begun, was self-perpetuating. As the California Supreme Court observed, in overruling past decisions and recognizing a wife's right to recover, it was bound by the common law, but the common law had shifted under its feet.[136] Once the weight of authoritative opinion began to shift as a result of persuasive judicial opinion and virtually unanimous scholarly commentary, even those courts that had been reluctant to pioneer in changing the law could claim that they were bound by prevailing authority. Indeed, this reliance on authority to justify policy change was a salient element in most decisions after 1965. The experiences of states that extended protection to wives undermined claims that this would produce intractable practical problems. By demonstrating that remedies could be developed for problems of double recovery and ac-

130. Dini v. Naiditch, 20 Ill. 2d 406, 429, 170 N.E.2d 881, 892 (1960).

131. Montgomery v. Stephan, 359 Mich. 33, 46, 101 N.W.2d 227, 233 (1960).

132. *See* Table D under Colorado, Kansas, Mississippi, New Hampshire, Oregon, and Tennessee.

133. *See* Table D under Pennsylvania, Texas, and Washington.

134. *See* Table D under Alaska, Arkansas, Delaware, Idaho, Indiana, Massachusetts, Missouri, Montana, Nevada, Ohio, and Rhode Island.

135. *See* Table D under Alabama, Arizona, California, Florida, Kentucky, Maryland, Minnesota, New Jersey, New York, and Wisconsin. For discussions of these developments, see Clark, *The Wife's Action for Negligent Impairment of Consortium*, 3 FAM. L.Q. 197 (1969); Comment, *A Wife's Right to Recover for Loss of Consortium*, 2 CUM.-SAM. L. REV. 189 (1971); Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864 (1976).

136. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

curate calculation of damages, these states helped overcome the reluctance of other states to adopt the *Hitaffer* rule.

Perhaps the most surprising aspect of these decisions was the courts' willingness to take an active role in charting a new policy direction. In sharp contrast to the courts that upheld the traditional rule, those that followed *Hitaffer* voiced few reservations about preempting legislative action. If they addressed the issue at all, they merely asserted that courts were responsible for the developments of common law.[137] These activist sentiments may indicate that state appellate courts are divided about what role they should play in updating the common law. It is more likely, however, that this difference stems from an awareness that other courts had already pioneered in the field, thereby establishing the propriety of judicial policymaking. It is noteworthy that these activist sentiments on occasion came from courts that had earlier professed the need for legislative deference.[138]

Several observations may be drawn from an analysis of these cases. First, it was a federal court—not a state court—that provided the initial impetus for reconsidering the common law on negligent invasion of consortium. Indeed, for over a decade after *Hitaffer*, state courts generally relied on the rationale in that case to justify decisions establishing a wife's right to recover. In this field of traditional state concern, then, state initiative in support of gender equality depended upon earlier federal judicial intervention. Second, reservations about the proper scope of judicial policymaking played a major role in circumscribing state court efforts to remedy this instance of gender discrimination. Although several courts expressed misgivings about the traditional common law rule after *Hitaffer*,[139] in the ten years following that decision, only a few felt it proper to recognize a wife's right to recover. Even after the weight of judicial opinion had swung in favor of *Hitaffer*, some courts still felt bound to uphold the traditional rule in the absence of legislative action.[140] Finally, the adoption of "little ERA's" in seventeen states did not play a significant role in overturning

137. In *Rodriguez v. Bethlehem Steel Corp.*, for example, the California Supreme Court noted, "Although the legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them." 12 Cal. 3d 382, 394, 525 P.2d 669, 676, 115 Cal. Rptr. 765, 772 (1974).

138. *Compare, e.g.*, City of Glendale v. Bradshaw, 108 Ariz. 582, 503 P.2d 803 (1972), *with* Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (1954).

139. *See, e.g.*, Smith v. United Constr. Workers, 271 Ala. 42, 43-44, 122 So. 2d 153, 154-55 (1960); Ripley v. Ewell, 61 So. 2d 420, 423 (Fla. 1952); Hoffman v. Dautel, 192 Kan. 406, 412-16, 388 P.2d 615, 620-24 (1964).

140. *See* note 125 and accompanying text *supra*.

the traditional common law rule. In five of the "little ERA" states, ratification of the constitutional guarantee occurred after the establishment of a wife's right to recover.[141] In six of the remaining states with constitutional guarantees, courts continued to deny wives a right to recover.[142] In one state, the issue was never litigated,[143] and in three others, courts subsequently recognized the right.[144] In only three instances, however, did state courts base their recognition of this right on their state constitutions.[145]

In the consortium cases, state appellate courts generally relied on their power to update the common law to eliminate an outmoded element in tort law. In replacing the previous judge-made rule with one more consistent with contemporary mores, the courts promoted the equality of the sexes. While this change may not have resulted from a grand judicial design, the effect of the consortium rulings—like that of many other common law rulings—has been to create a more equitable social order and to expand individual liberties.

Updating the common law is not the only means by which state courts achieve results. Through statutory interpretation, either alone or in conjunction with common law policymaking, state appellate courts also contribute—again, at times inadvertently—to the protection of individual liberties. The changing law of custody in the states provides a further illustration of predominantly nonconstitutional decisions that have resulted in greater sexual equality.

B. Child Custody—The "Tender Years Doctrine"

Until the mid-nineteenth century, American courts were influenced by, but did not always follow, the English common law practice of awarding custody to fathers in divorce cases. Gradually, legislatures and courts indicated increasing concern with the welfare of the child.[146] Changes in the legal status of married women[147] and the development

141. *See* Table D under Colorado, Illinois, Maryland, Massachusetts, and Montana.

142. *See* Table D under Connecticut, Louisiana, New Mexico, Utah, Virginia, and Wyoming.

143. *See* Table D under Hawaii.

144. *See* Table D under Pennsylvania, Texas, and Washington.

145. *See* note 133 *supra*. In Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974), the Alaska Supreme Court mentioned the state's ERA in a footnote, but nevertheless based its ruling on the common law.

146. *See* Foster & Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 325-29 (1978).

147. Comment, *The Father's Right to Child Custody in Interparental Disputes*, 49 TUL. L. REV. 189 (1974).

of theories about the needs of very young children[148] and about women's essential nurturing function[149] produced further shifts in judicial practice. From the early 1900's to the 1960's, courts consistently denied paternal claims, praising maternal "sympathy" and "constant ministrations,"[150] discerning "but a twilight zone between a mother's love and the atmosphere of heaven."[151] Less sentimental courts confined themselves to noting that there are "biological connections between mother and child"[152] and that mothers, not fathers, lactate.[153] This preference for maternal custody, particularly for preschool children, found judicial expression in the "tender years" doctrine.[154] The maternal preference is not absolute, since courts are bound to consider the "best interests of the child,"[155] but the very vagueness of that requirement gives an advantage to the mother. In some jurisdictions, the doctrine is employed as a "tie breaker"[156]—when both parents are found "fit,"[157] the award, "all else being equal,"[158] is made to the mother.

The tender years doctrine has long been attacked by behavioral scientists, social workers, and practitioners of family law, all of whom maintain that it is nothing more than a shortcut employed in lieu of the careful case-by-case investigation necessary for determining the best interest of the child.[159] Some courts also have questioned the doctrine, pointing out that it is premised on traditional assumptions about female and male divisions of responsibility and therefore is not applicable when mothers work outside the home.[160] The Uniform Marriage and Divorce Act (UMDA) of 1971[161] has eroded the doctrine, for although it does not provide for laws prohibiting preference based on

148. Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 FAM. L.Q. 101, 138-39 (1977); Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. REV. 474, 481 (1979).

149. Kurtz, *supra* note 148, at 135-37; Weitzman & Dixon, *supra* note 148, at 478-79.

150. Jenkins v. Jenkins, 173 Wis. 592, 595, 181 N.W. 826, 827 (1921).

151. Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938).

152. Bruce v. Bruce, 141 Okla. 161, 167-68, 285 P. 30, 37 (1930).

153. Arends v. Arends, 30 Utah 2d 328, 329, 517 P.2d 1019, 1020 (1974).

154. Foster & Freed, *supra* note 146, at 329-30; Weitzman & Dixon, *supra* note 148.

155. Kurtz, *supra* note 148, at 138.

156. Foster & Freed, *supra* note 146, at 329, 331.

157. *Id.* at 329; Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695, 699 (1978).

158. Foster & Freed, *supra* note 146, at 331.

159. *See id.* at 331-32, 340; Jones, *supra* note 157, at 736-37; Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1977).

160. Stanfield v. Stanfield, 435 S.W.2d 690, 692 (Mo. Ct. App. 1968); State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 181, 350 N.Y.S.2d, 285, 288 (N.Y. Fam. Ct. 1973).

161. UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1971).

sex, and may even be viewed as endorsing the doctrine,[162] it establishes such precise guidelines for determining the "best interest" that it casts serious doubts on the doctrine's preference for mothers.[163]

Thirty-five states have adopted the UMDA either in whole or in part or have used it as a model.[164] In none of these states do custody statutes stipulate any form of maternal preference.[165] By the mid-to-late 1970's, a preponderance of states had revised their custody laws to give equal rights to both parents, to specifically *forbid* preference based on the sex of either parent, or to establish fairly detailed "best interest" standards. A few states give courts wide discretion in making awards. Although there is no way of knowing to what extent the UMDA, state reforms, the growing divorce rate, the increasing number of women in the workforce, and changing attitudes toward male and female roles in general and toward parenting in particular are responsible, it now appears that fathers are more willing to seek custody and are more successful in obtaining it.[166]

Although the tender years doctrine has fallen into disrepute, it is still utilized in some jurisdictions as a "tie breaker,"[167] and in others as a rebuttable presumption;[168] that is, the father may present evidence that he is the better parent. More importantly, it is, in the minds of many judges, equated with "best interest."[169] The doctrine's vitality is reinforced by a reluctance to reverse trial judges' awards in these exceedingly difficult cases. It is often impossible to determine the extent to which a trial judge is influenced by gender, and an appellate court will not reverse in favor of the father unless a trial judge has clearly abused his or her discretionary authority. Commentators agree that case law has yet to catch up with "black letter" law.[170] Table E, which refers mainly to appellate courts, may present only the tip of the iceberg.

In addition to the dubious relationship between "tender years" and "best interest," the tender years doctrine is inherently gender bi-

162. *See* Jones, *supra* note 157, at 723.

163. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW 189 (1977).

164. *See* Table E under column entitled "Statute." *See also* Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105, 121-23 (1979).

165. Foster & Freed, *supra* note 146, at 338.

166. *See* Comment, *supra* note 147.

167. *See* Table E under Idaho, Minnesota, Montana, South Dakota, Utah, and Virginia. *See also* Foster & Freed, *supra* note 146, at 332.

168. *See* Table E under Alabama and Wyoming. *See also* Jones, *supra* note 157, at 699.

169. Kurtz, *supra* note 148, at 138; Jones, *supra* note 157, at 700-01.

170. Roth, *supra* note 159, at 433-38. *See also* Foster & Freed, *supra* note 146, at 332-33.

ased. Not only does it disadvantage fathers, but it imposes hardships and psychological burdens on mothers who do not want or should not have the custody of their children. It is argued that the doctrine, unless justified by a "compelling" reason for its continued use (and this would be hard to imagine), would be found unconstitutional under the proposed federal Equal Rights Amendment. Indeed, it is doubtful that it would survive under the United States Supreme Court's "heightened ends and means scrutiny" test announced in *Craig v. Boren*,[171] or even the "rational basis" test enunciated in *Reed v. Reed*.[172] Furthermore, the Court has ruled that under most circumstances, fathers of illegitimate children have the same rights as mothers.[173] Nevertheless, the Court has three times refused to decide whether or not the doctrine violates the Fourteenth Amendment.[174] This aspect of family law thus remains—at least at present—an exclusively state concern.

1. The Tender Years Doctrine in "Little ERA" States

It is argued that the doctrine cannot pass muster under state ERA's, whether courts employ "strict scrutiny," which the proposed federal ERA would require, or the "intermediate" or "minimal" scrutiny utilized in *Craig* and *Reed*. As Table F indicates, the doctrine has been challenged on constitutional grounds in seven of the seventeen "little ERA" states.[175] It was invalidated in Illinois,[176] in Maryland,[177] and in Pennsylvania[178] and was significantly modified in Utah, the only state that, at one time, legislatively endorsed the doctrine;[179] it was sustained in Louisiana[180] and in Virginia.[181] Although the Colorado Supreme Court rejected a constitutional challenge to the doctrine because the case provided insufficient evidence of gender bias, courts in

171. 429 U.S. 190 (1976).

172. 404 U.S. 71 (1971).

173. Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

174. Davis v. Davis, 306 Minn. 536, 235 N.W.2d 836 (1975), *cert. denied*, 426 U.S. 943 (1976); Gordon v. Gordon, 577 P.2d 1271 (Okla.), *cert. denied*, 439 U.S. 863 (1978); Arends v. Arends, 30 Utah 2d 328, 517 P.2d 1019, *cert. denied*, 419 U.S. 881 (1974).

175. *See* Table F under Colorado, Illinois, Louisiana, Maryland, Pennsylvania, Virginia, and Utah.

176. State *ex rel.* Elmore v. Elmore, 46 Ill. App. 3d 504, 361 N.E.2d 615 (1977).

177. McAndrew v. McAndrew, 39 Md. App. 1, 382 A.2d 1081 (1978).

178. Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977).

179. Cox v. Cox, 532 P.2d 994 (Utah 1975), held that mothers have no absolute right to custody under the state constitution. UTAH CODE ANN. § 30-3-10 (Supp. 1981) now rejects a promaternal presumption.

180. Broussard v. Broussard, 320 So. 2d 236 (La. Ct. App. 1975).

181. McCreery v. McCreery, 218 Va. 352, 237 S.E.2d 167 (1977).

that state by then had ceased to rely on the doctrine.[182] Courts in the remaining "little ERA" states have not been presented with the constitutional question. The doctrine is still used in Montana as a "tie breaker,"[183] and, although the case law following recent statutory changes is still unsettled, it is also apparently used in New Hampshire,[184] New Mexico,[185] and Wyoming[186] as a rebuttable presumption. It thus appears that constitutional guarantees of gender equality have little bearing on a doctrine that reflects a "baggage of sexual stereotypes."[187]

It also appears that on this issue there is little difference in the "little ERA" states among activist, gender-activist, and passive courts.[188] The activist Pennsylvania Supreme Court, questioning "the legitimacy of a doctrine that is predicated upon traditional or stereotypical roles of men and women," found the doctrine "offensive to the concept of the equality of the sexes" that the court "had embraced as a constitutional principle."[189] The intermittently activist and gender-activist courts in Illinois and Maryland have also invalidated the doctrine on the basis of their state constitutions.[190] Even the conservative Utah high court, while upholding a modified version of the doctrine, has questioned the viability of the state's "tender years" statute.[191]

On the other hand, the picture changes when statutory construction is taken into account. Of the thirteen "little ERA" states that also have either parental equalization or gender-neutral statutes, nine have discarded the tender years doctrine.[192] As a stipulation to its parent

182. *See* Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973).

183. Lotton v. Lotton, 169 Mont. 223, 545 P.2d 643 (1976).

184. *See* Del Pozzo v. Del Pozzo, 113 N.H. 436, 309 A.2d 151 (1973).

185. *See* Csanyi v. Csanyi, 82 N.M. 411, 483 P.2d 292 (1971).

186. Butcher v. Butcher, 363 P.2d 923 (Wyo. 1961).

187. Orr v. Orr, 440 U.S. 268, 283 (1979).

188. *Compare* Table A *with* Table F.

189. Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 299-300, 368 A.2d 635, 638-40 (1977).

190. *See* Tables E & F under Illinois and Maryland.

191. *See* Tables E & F under Utah; note 179 *supra*. The courts now regard the maternal preference as important when all other things are equal, but are guided, under the present statute, by what is in the best interests of the child, not by a promaternal statutory presumption. *See* Jorgenson v. Jorgenson, 599 P.2d 510 (Utah 1979); Smith v. Smith, 564 P.2d 307 (Utah 1977); Rice v. Rice, 564 P.2d 305 (Utah 1977).

192. The eight "little ERA" states that follow their parent-equalization or gender-neutral statutes are Alaska, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Texas, and Washington. Louisiana and Virginia do not follow their parent-equalization statutes because their courts have expressly upheld the tender years doctrine. The doctrine in New Hampshire and Wyoming has not been expressly discarded and may still be followed. *See* Tables E and F.

equalization statute, Connecticut requires that awards be made to the parent "not at fault" in the divorce; however, Connecticut courts, focusing on "best interest" and rejecting automatic maternal preference, have tended to ignore this stipulation.[193] Of the four "little ERA" states that have either "best interest" statutes or statutes giving courts discretion, two states have interpreted these statutes to mean that both parents must be treated equally, in accordance with constitutional guarantees of sexual equality.[194] Thus, given statutes providing for parental equalization, gender neutrality or the "best interest" of the child, eleven of the seventeen appellate judiciaries in "little ERA" states—be they activist or restraintist—have followed or even have gone beyond legislative attempts to provide gender equality in child custody cases.

2. The Tender Years Doctrine in Non-ERA States

An examination of decisions in the thirty-three non-ERA states referred to in Table G yields largely similar results. Courts in at least seven of the twenty-two states with parental equalization and gender-neutral statutes have adhered to these legislative mandates.[195] Courts in Georgia, like those in Connecticut,[196] have tended to ignore the legislative requirement for "innocent party" awards.[197] Courts in Iowa and Maine, where the custody statutes give courts wide discretion, have rejected the tender years doctrine.[198] Of the eight "best interest"/UMDA states, only Arizona has discarded the doctrine; in the other states, the doctrine continues to be used as a "tie breaker" or is subordinate to a determination of the welfare of the child.[199]

193. *See* Skubas v. Skubas, 31 Conn. Supp. 340, 330 A.2d 105 (Conn. Super. Ct. 1979); Jones, *supra* note 157, at 704. It is unlikely that a court, concerned with the welfare of the child, would make an award on the basis that the parent was not responsible for the breakup of the marriage.

194. State *ex rel.* Elmore v. Elmore, 46 Ill. App. 3d 504, 361 N.E.2d 615 (1977); Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977). Montana and possibly New Mexico still adhere to the tender years doctrine.

195. *See* Table E under California, Delaware, Georgia, Indiana, Kentucky, Nebraska, New York, North Carolina, Ohio, and Oklahoma. Although it is unsettled, Kansas and Oregon are probably also in this category. Despite their parental-equalization and gender-neutral statutes, Alabama, Florida, Minnesota, New Jersey, South Carolina, South Dakota, Tennessee, and Wisconsin have not discarded the tender years doctrine.

196. *See* note 193 and accompanying text *supra*.

197. *See* Rigdon v. Rigdon, 222 Ga. 679, 151 S.E.2d 712 (1966); Jones, *supra* note 157, at 706.

198. The other states having statutes that give courts discretion, Mississippi, North Dakota, and West Virginia, have not rejected the tender years doctrine.

199. *See* Table E under Arizona, Arkansas, Idaho, Missouri, North Dakota, and Rhode Island. Although it is unsettled, Vermont also appears to still use the doctrine.

Once again, there appears to be little difference between activist and conservative courts. The highly activist and gender-activist California courts follow the state's equalization statute.[200] The gender-activist New York courts also adhere to an equalization statute.[201] On the other hand, the activist New Jersey judiciary continues to cling to the tender years doctrine.[202] Meanwhile, the Iowa and Nebraska courts, following discretionary and gender-neutral statutes, respectively, have issued rulings requiring trial courts to justify awards in detailed and thoughtful terms.[203] The Iowa Supreme Court in particular has provided a model of how an appellate court may, without resort to constitutional arguments, compel trial courts to make gender-neutral awards. The court stated:

> [The "tender years doctrine"] is simply not justified as an *a priori* principle. It tends to obscure the basic tenet in custody cases which overrides all others, the best interests of the children. The real issue is not the sex of the parent but which parent will do better in raising the children. Resolution of that issue depends upon what the evidence actually reveals in each case, not upon what someone predicts it will show in many cases. If past decisions teach us anything, "it is that each case must be decided on its own peculiar facts."[204]

3. The Tender Years Doctrine and the New Judicial Federalism

The major difference between states that do and do not have "little ERA's" lies in judicial survival of the tender years doctrine. The doctrine continues to be sustained in perhaps a third of the ERA states, compared with more than half of the non-ERA states.[205] From this it might appear that constitutional provisions are somewhat controlling and that those who have faith in the new judicial federalism are vindicated, at least on this score.

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200. *See, e.g., In re* Marriage of Urband, 68 Cal. App. 3d 796, 137 Cal. Rptr. 433 (1977).

201. State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973).

202. Mayer v. Mayer, 150 N.J. Super. 556, 376 A.2d 214 (N.J. Super. Ct. Ch. Div. 1977).

203. See *In re* Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974), in which the court lists 12 factors that trial courts should take into account when making custody awards. *Id.* at 687-88. *See also In re* Marriage of Winter, 223 N.W.2d 165 (Iowa 1974) (application of *Bowen* principles); Christensen v. Christensen, 191 Neb. 355, 358, 215 N.W.2d 111, 114 (1974) (court lists 10 factors that trial courts should take into account). *Bowen* is often mentioned as a "model" ruling. *See, e.g.,* Foster & Freed, *supra* note 146, at 335-36.

204. *In re* Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974) (citation omitted).

205. In three ERA states and in four non-ERA states, the status of the doctrine is uncertain.

Constitutional mandates, however, are less decisive than might appear. In only one state, Utah, was it necessary to invalidate a statute on constitutional grounds.[206] In the three other states that struck down the doctrine on constitutional grounds, alternative means of eliminating the doctrine were also available. Maryland courts could have used the state's equalization statute to dispose of the doctrine, and Illinois and Pennsylvania courts could have abolished the doctrine on other grounds—as did courts in Iowa and Maine.[207]

If constitutional provisions are not the decisive factor, an alternative explanation for differences among states might be found in legislative action. It is clear that legislatures, in ERA as well as in non-ERA states, have taken the lead. Statutory directives, however, have not always been determinative, since, as Table H indicates, some states in both groups have ignored the statutes. Before the adoption of New Hampshire's ERA, for example, a statute was enacted that forbade courts from giving "any preference to either of the parents . . . because of the parent's sex."[208] After the adoption of Virginia's ERA, a statute was enacted that equalized parental rights.[209] Yet in neither of these two states were courts significantly influenced by either the statute or constitutional command, since the tender years doctrine has not been discarded. Minnesota's statute provides that judges "shall not prefer one parent over the other solely on the basis of the sex of the parent."[210] Wisconsin law does not permit "one parent [to be preferred] over the other wholly on the basis of sex."[211] Yet Minnesota courts continue to use the "tender years doctrine" as a tie breaker,[212] and Wisconsin courts have had no difficulty in reconciling the doctrine with the gender-neutral law.[213]

What emerges, then, is a curious combination of judicial discretion (in an area in which courts have traditionally exercised great discretion) and statutory and/or constitutional directive. Often, the prime consideration appears to be the judges' willingness to utilize the legal framework available to them to eliminate the tender years doctrine. Courts in Illinois, Maryland, and Pennsylvania thus have employed a

206. Arends v. Arends, 30 Utah 2d 328, 517 P.2d 1019, *cert. denied*, 419 U.S. 881 (1974).

207. *In re* Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974); Roussel v. State, 274 A.2d 909 (Me. 1971).

208. N.H. REV. STAT. ANN. § 458:17 (Supp. 1979) (as amended 1975).

209. VA. CODE § 20-107 (Cum. Supp. 1975).

210. MINN. STAT. ANN. § 518.17, subd. 3 (West Supp. 1982) (as amended 1974).

211. WIS. STAT. ANN. § 767.24(2) (West 1981).

212. Hoffman v. Hoffman, 303 Minn. 559, 227 N.W.2d 387 (1975).

213. Scolman v. Scolman, 66 Wis. 2d 761, 226 N.W.2d 388 (1975). *See also* Foster & Freed, *supra* note 146, at 363.

sweeping constitutional approach to eliminate the doctrine as a form of gender discrimination;[214] courts in Arizona and Alaska have eliminated maternal preference merely by adhering closely to statutes that may not have been concerned with sexual equality,[215] and the high courts in Iowa and Nebraska have banished the doctrine by requiring a meticulous case-by-case approach to determine the "best interests" of the child.[216] The result in terms of gender equality, whatever the aim or legal foundation, has been much the same.

Conclusion

The advent of the new judicial federalism, as Table B illustrates, has not produced a vigorous use of state constitutional guarantees to eliminate gender discrimination. The very paucity of cases may be due either to the relative newness of the constitutional guarantees or to statutory reforms that either antedated or accompanied the adoption of the ERA's. The custody cases provide an example of the latter. A more important factor, however, is litigant preference for federal law and forums, which has led to federal dominance in the field of gender discrimination. This preference is evidenced by the sheer number of gender discrimination cases litigated in federal courts. From 1971 to 1979, the United States Supreme Court alone decided nineteen gender equality cases[217]—more than any state supreme court under a state ERA.[218] Federal district courts and federal courts of appeal have decided many times that number. As Table C suggests, federal courts and law have virtually preempted such crucial matters as employment discrimination. Even when litigants have raised claims in state courts, those courts tend to rely on federal law either explicitly, by basing decisions on relevant federal statutes or cases, or indirectly, by using the Supreme Court's equal protection methodology when interpreting the state constitution.

The survey of state and federal gender equality cases offers little support, therefore, for those who proclaim or hope that state courts will respond to the promise of the new judicial federalism. Although some

214. State *ex rel.* Elmore v. Elmore, 46 Ill. App. 3d 504, 361 N.E.2d 615 (1977); McAndrew v. McAndrew, 39 Md. App. 1, 382 A.2d 1081 (1978); Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977).

215. King v. King. 477 P.2d 356 (Alaska 1970); Georgia v. Georgia, 27 Ariz. App. 271, 553 P.2d 1256 (1976).

216. *See* note 203 *supra*.

217. *See* L. GOLDSTEIN, THE CONSTITUTIONAL RIGHTS OF WOMEN: CASES IN LAW AND SOCIAL CHANGE 381-87 (1979).

218. *See* ERA IMPACT PROJECT CLEARINGHOUSE, INDEX AND REFERENCE (1980).

state courts have indeed employed state constitutions to afford greater support for gender equality than have federal courts, the fact remains that explicit constitutional bans against sex discrimination *do not in themselves* guarantee greater protection. In other words, the "little ERA's" do not, at least thus far, compensate for the lack of a federal ERA.

On the other hand, as the consortium and custody cases demonstrate, this does not mean that state appellate courts have been inactive. At times taking clues from federal courts, at times responding to legislative mandates, and at times proceeding on their own initiative, state courts have decided a variety of cases with wide implications for gender equality. The net, and certainly little noted, result of these decisions has been that traditional views about the functions, roles, and responsibilities of women and men have been largely eliminated in these areas.

These observations strongly suggest that civil liberties advocates in general, and womens' rights advocates in particular, explore alternative means of achieving their desired goals. A recent study of selected state supreme court rulings over the past 100 years reveals that courts, through the exercise of their common law jurisdiction and by means of statutory interpretation, have indicated increasing concern "with the individual, the down-trodden" and with deliberate social change.[219] Judicially initiated reform in tort law, for example, much of which has taken place in the past twenty years, is indicative of one way in which courts "venture" to "do justice" and points toward the possibility that tort law may develop along lines that will oblige governments and citizens to behave carefully and responsibly.[220] The New Jersey Supreme Court, for one, has historically based what are essentially civil rights and liberties rulings on common law.[221] It also recently interpreted an unremarkable constitutional directive to provide a "thorough and effi-

219. Kagan, Cartwright, Friedman & Wheeler, *supra* note 8, at 155.

220. *See* R. KEETON, *supra* note 7; M. SHAPO, THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY (1977). "The analysis [offered] here thrusts toward an alternative definition of duty, specifically stated with reference to cases that generally are known as failures to act. From these cases and across these pages come many persons whose plights touch us at a level so deep that we must either help them or turn away, aware of our own vulnerability." *Id.* at xii.

221. *Project Report: Toward an Activist Role for State Bills of Rights, supra* note 18, at 338-39. In State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971), the court drew upon the common law to protect the right of migrant laborers to confer, against the wishes of property owners, with Office of Economic Opportunity personnel in the privacy of their homes. See also Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972), which recognizes the right of open access to beaches.

cient education"[222] to mean that per pupil expenditures must be substantially equalized throughout the state—thus reading an equal protection guarantee into the mandate to establish public schools.[223]

Although state appellate courts hear a far greater variety of cases than do their federal counterparts, unlike judicial policymaking at the national level, state court policymaking is taken largely for granted.[224] For litigants who are anxious to use the courts as vehicles for change, the judiciaries of the fifty states and the store of common law, statutes, and constitutional provisions upon which they may draw, present a vast and largely untapped reservoir. As our findings suggest, it is in the day-by-day business of the state courts, rather than through extraordinary constitutional litigation, that the full potential of the new judicial federalism may be realized.

222. N.J. CONST. art. VIII, § 4, cl. 1.
223. Robinson v. Cahill, 119 N.J. Super. 40, 289 A.2d 569 (N.J. Sup. Ct. Law Div. 1972).
224. Linde, *supra* note 43, at 248-49.

APPENDIX

Table A

State Court Civil Liberties[a1] and Gender Activism[a2]

State	Year State ERA Ratified	Overall Activism	Gender Activism
Alabama		No	No
Alaska	1971	Yes	too few cases
Arizona		No	No
Arkansas		No	No
California		Yes	Yes
Colorado	1972	No	No
Connecticut	1974	No	No
Delaware		No	No
Florida		No	No
Georgia		No	No
Hawaii	1968	Yes	No
Idaho		No	No
Illinois	1971	No	Yes
Indiana		No	No
Iowa		No	No
Kansas		No	No
Kentucky		No	No
Louisiana	1974	No	No
Maine		Moderate	No
Maryland	1972	Moderate	Yes
Massachusetts	1976	Yes	Yes
Michigan		Yes	No
Minnesota		Moderate	No
Mississippi		No	No
Missouri		No	No
Montana	1973	No	No
Nebraska		No	No
Nevada		No	No
New Hampshire	1975	No	too few cases
New Jersey		Yes	Moderate
New Mexico	1973	No	No
New York		Yes	Yes
North Carolina		No	No
North Dakota		No	No
Ohio		No	No
Oklahoma		No	No
Oregon		Yes	No
Pennsylvania	1971	Yes	Yes

State	Year State ERA Ratified	Overall Activism	Gender Activism
Rhode Island		No	No
South Carolina		No	No
South Dakota		No	No
Tennessee		No	No
Texas	1972	No	Yes
Utah	1896	No	No
Vermont		No	No
Virginia	1971	No	No
Washington	1972	Yes	Yes
West Virginia		No	No
Wisconsin		Moderate	No
Wyoming	1896	No	No

a1 Civil Liberties Activism refers to a court that has, generally, a reputation for sympathetic consideration of civil liberties claims and has relied on state constitutions to extend protections for individual rights that are broader than those accorded by the Burger Court. For examples of this activism, see note 50 *supra*. For commentary on state high court civil libertarian activism in the post-Warren court years, see note 18 *supra*. *See also* Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 725 n.2 (1981).

a2 The designations of whether or not a court is gender activist are based on Driscoll & Rouse, *Through a Glass Darkly: A Look at State ERA's*, 12 SUFFOLK U.L. REV. 1282 (1978), and ERA IMPACT PROJECT CLEARINGHOUSE, INDEX AND REFERENCE (1980).

Table B

Litigation Under State Equal Rights Amendments

State	Total State Supreme Court Cases Under ERA	Invalidation of Sex-Based Rulings or Classifications Under ERA
Alaska	3[b1]	2[b2]
Colorado	10[b3]	1[b4]
Connecticut	1[b5]	0
Hawaii	2[b6]	0
Illinois	6[b7]	2[b8]
Louisiana	0	0
Maryland	6[b9]	4[b10]
Massachusetts	5[b11]	3[b12]
Montana	8[b13]	0
New Hampshire	1[b14]	1[b15]
New Mexico	2[b16]	0
Pennsylvania	14[b17]	10[b18]
Texas	3[b19]	2[b20]
Utah	6[b21]	1[b22]
Virginia	1[b23]	0
Washington	9[b24]	3[b25]
Wyoming	2[b26]	1[b27]
TOTAL	79	30

Sources: LEGAL REFERENCE GUIDE TO STATE ERA'S (1982).

b1 Plas v. State, 598 P.2d 966 (Alaska 1979) (criminal); Brown v. Wood, 575 P.2d 760 (Alaska 1978) (employment); Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974) (family).

b2 Plas v. State, 598 P.2d 966 (Alaska 1979); Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974).

b3 R. McG. v. J.W., 615 P.2d 666 (1980) (family); Menne v. Menne, 194 Colo. 304, 572 P.2d 472 (1977) (family); People v. Salinas, 191 Colo. 171, 551 P.2d 703 (1976) (criminal); People v. Barger, 191 Colo. 152, 550 P.2d 1281 (1976) (criminal); Sylvara v. Industrial Comm'n, 191 Colo. 92, 550 P.2d 868 (1976) (employment); *In re* Marriage of Franks, 189 Colo. 499, 542 P.2d 845 (1975) (family); People v. Taylor, 189 Colo. 202, 540 P.2d 320 (1975) (procedure); People v. Gould, 188 Colo. 113, 532 P.2d 953 (1975) (criminal); People v. Elliott, 186 Colo. 65, 525 P.2d 457 (1974) (family); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973) (criminal).

b4 R. McG. v. J.W., 615 P.2d 666 (1980).

b5 Page v. Welfare Comm'r, 170 Conn. 258, 365 A.2d 1118 (1976) (procedure).

b6 State v. Rivera, 62 Hawaii 120, 612 P.2d 526 (1980) (criminal); Holdman v. Olim, 59 Hawaii 346, 581 P.2d 1164 (1978) (criminal).

b7 People v. Yocum, 66 Ill. 2d 211, 361 N.E.2d 1369 (1977) (family); People v. Boyer, 63 Ill. 2d 433, 349 N.E.2d 50 (1976) (family); People v. Grammer, 62 Ill. 2d 393, 342 N.E.2d 371 (1976) (procedure); *In re* Estate of Karas, 61 Ill. 2d 40, 329 N.E.2d 234 (1975) (procedure); Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (1974) (family); People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974) (criminal).

b8 Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (1974); People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

b9 Condore v. Prince George's County, 289 Md. 516, 425 A.2d 1011 (1981) (family); Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980) (torts); Kerr v. Kerr, 287 Md. 363, 412 A.2d 1001 (1980) (family); Kemp v. Kemp, 287 Md. 165, 411 A.2d 1028 (1980) (family); Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (family); Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973) (procedure).

b10 Condore v. Prince George's County, 289 Md. 516, 425 A.2d 1011 (1981); Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980); Kemp v. Kemp, 287 Md. 165, 411 A.2d 1028 (1980); Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977).

b11 Lowell v. Kowalski, 1980 Mass. Adv. Sh. 1243, 405 N.E.2d 135 (1980) (family); Attorney General v. MIAA, 1979 Mass. Adv. Sh. 1584, 393 N.E.2d 284 (1979) (education); Commonwealth v. King, 374 Mass. 5, 372 N.E.2d 196 (1977) (criminal); Secretary of the Commonwealth v. City Clerk, 373 Mass. 178, 366 N.E.2d 717 (1977) (family); Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 361 N.E.2d 225 (1977) (education).

b12 Lowell v. Kowalski, 1980 Mass. Adv. Sh. 1243, 405 N.E.2d 135 (1980); Attorney General v. MIAA, 1979 Mass. Adv. Sh. 1584, 393 N.E.2d 284 (1979); Secretary of the Commonwealth v. City Clerk, 373 Mass. 178, 366 N.E.2d 717 (1977).

b13 *In re* Cram, 606 P.2d 145 (1980) (procedure); State v. Henry, 177 Mont. 426, 582 P.2d 321 (1978) (criminal); Rogers v. Rogers, 169 Mont. 403, 548 P.2d 141 (1976) (procedure); State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976) (criminal); *In re* Kujath, 169 Mont. 128, 545 P.2d 662 (1976) (family); Taylor v. Taylor, 167 Mont. 164, 537 P.2d 483 (1975) (family); Gilbert v. Gilbert, 166 Mont. 312, 533 P.2d 1079 (1975) (procedure); Clontz v. Clontz, 166 Mont. 206, 531 P.2d 1003 (1975) (procedure).

b14 Buckner v. Buckner, 120 N.H. 402, 415 A.2d 871 (1980) (family).

b15 *Id.*

b16 Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975) (education); Schaab v. Schaab, 87 N.M. 220, 531 P.2d 954 (1974) (family).

b17 Murphy v. Harleysville Mut. Ins. Co., 282 Pa. Super. 244, 422 A.2d 1097 (1980), *cert. denied*, 454 U.S. 896 (1981) (insurance); Pennsylvania Human Relations Comm'n v. Mars Community Boys Baseball Ass'n, 488 Pa. 102, 410 A.2d 1246 (1980) (procedure); George v. George, 487 Pa. 133, 409 A.2d 1 (1979) (family); *In re* Estate of Klein, 474 Pa. 416, 378 A.2d 1182 (1977) (family); Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977) (family); Adoption of Walker, 468 Pa. 165, 360 A.2d 603 (1976) (family); Staufer v. Staufer, 465 Pa. 558, 351 A.2d 236 (1976) (family); Butler v. Butler, 464 Pa. 522, 347 A.2d 477 (1975) (family); Commonwealth v. Saunders, 459 Pa. 677, 331 A.2d 193 (1975) (criminal); DiFlorida v. DiFlorida, 459 Pa. 641, 331 A.2d 174 (1975) (family); Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974) (criminal); Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974) (family); Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 109 (1974) (family); Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974) (family).

b18 *In re* Estate of Klein, 474 Pa. 416, 378 A.2d 1182 (1977); Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977); Adoption of Walker, 468 Pa. 165, 360 A.2d 603 (1976); Butler v. Butler, 464 Pa. 522, 347 A.2d 477 (1975); Commonwealth v. Saunders, 459 Pa. 677, 331 A.2d 193 (1975); DiFlorido v. DiFlorido, 459 Pa. 641, 331 A.2d 174 (1975); Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974); Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974); Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 109 (1974); Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974).

b19 *In re* T.E.T., 603 S.W.2d 793 (Tex. 1980) (family); Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978) (family); Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973) (torts).

b20 Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978); Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973).

b21 Cox v. Cox, 532 P.2d 994 (Utah 1975) (family); Turner v. Department of Employment Sec., 531 P.2d 870 (Utah 1975) (employment); Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974) (family); Kopp v. Salt Lake City, 29 Utah 2d 170, 506 P.2d 809

(1973) (employment); *In re* Estate of Armstrong, 21 Utah 2d 89, 440 P.2d 881 (1968) (wills); Salt Lake City v. Wilson, 46 Utah 60, 148 P. 1104 (1915) (taxes).

b22 Cox v. Cox, 532 P.2d 994 (Utah 1975).

b23 Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973) (juries).

b24 MacLean v. First N.W. Indus. of America, Inc., 96 Wash. 2d 338, 635 P.2d 683 (1981) (procedure); Lundgren v. Whitney's, Inc., 94 Wash. 2d 91, 614 P.2d 1272 (1980) (family); Willard v. State Dep't of Social & Health Servs., 91 Wash. 2d 759, 592 P.2d 1103 (1979) (family); Wyman v. Wallace, 91 Wash. 2d 317, 588 P.2d 1133 (1979) (torts); Seattle v. Buchanan, 90 Wash. 2d 584, 584 P.2d 918 (1978) (criminal); Marchioro v. Chaney, 90 Wash. 2d 298, 582 P.2d 487 (1978) (political parties); Bolser v. Washington State Liquor Control Bd., 90 Wash. 2d 223, 580 P.2d 629 (1978) (employment); State v. Wood, 89 Wash. 2d 97, 569 P.2d 1148 (1977) (family); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) (education).

b25 MacLean v. First N.W. Indus. of America, Inc., 96 Wash. 2d 338, 635 P.2d 683 (1981); Lundgren v. Whitney's, Inc., 94 Wash. 2d 91, 614 P.2d 1272 (1980); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

b26 State v. Yazzie, 67 Wyo. 256, 218 P.2d 482 (1950) (juries); McKinney v. State, 3 Wyo. 719, 30 P. 293 (1892) (procedure).

b27 State v. Yazzie, 67 Wyo. 256, 218 P.2d 482 (1950).

Table C

Issues Raised Under State ERA's[c1]

Issue	Number of Cases
Criminal Law	15
Education	4
Employment	5
Family Law	34
Insurance	1
Juries	2
Political Parties	1
Procedure	12
Taxation	1
Torts	3
Wills	1
TOTAL	79

c1 The information in this table was compiled from Table B.

Table D

Recovery for Loss of Consortium, 1950-1980

State	Denial of Wife's Claim	Recognition of Wife's Claim	Basis for Recognition
Alabama	Smith v. United Constr. Workers, 271 Ala. 42, 122 So. 2d 153 (1960)	Swartz v. United States Steel Corp., 293 Ala. 439, 304 So. 2d 881 (1974)	Common Law
Alaska		Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974)	Common Law
Arizona	Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (1954)	City of Glendale v. Bradshaw, 108 Ariz. 582, 503 P.2d 803 (1972)	Common Law
Arkansas		Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957)	Common Law
California	Deshotel v. Atchison, Topeka & Santa Fe Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958)	Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974)	Common Law
Colorado	Johnson v. Enlow, 132 Colo. 101, 286 P.2d 630 (1955)	Crouch v. West, 29 Colo. App. 72, 477 P.2d 805 (1970)	Legislation
Connecticut	Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956)		
Delaware		Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (1961)	Common Law
Florida	Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952)	Gates v. Folcy, 247 So. 2d 40 (Fla. 1971)	Common Law
Georgia		Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953)	Common Law
Hawaii	Not considered since 1950		
Idaho		Nichols v. Sonneman, 91 Idaho 199, 418 P.2d 562 (1966)	Common Law
Illinois		Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960)	Common Law

State	Denial of Wife's Claim	Recognition of Wife's Claim	Basis for Recognition
Indiana		Troue v. Marker, 145 Ind. App. 111, 249 N.E.2d 512 (1969)	Common Law
Iowa		Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956)	Common Law
Kansas	Hoffman v. Dautel, 192 Kan. 406, 388 P.2d 615 (1964)	Albertson v. Travis, 2 Kan. App. 2d 153, 576 P.2d 1090 (1978)	Legislation
Kentucky	LaFace v. Cincinnati, Newport & Covington Ry., 249 S.W.2d 534 (Ky. 1952)	Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970)	Common Law
Louisiana	Johnston v. Fidelity Nat'l Bank, 152 So. 2d 327 (1963)		
Maine	Potter v. Schafter, 161 Me. 340, 211 A.2d 891 (1965)		
Maryland	Coastal Tank Lines, Inc. v. Canoles, 207 Md. 37, 113 A.2d 82 (1955)	Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967)	Common Law Federal Constitution
Massachusetts		Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973)	Common Law
Michigan		Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960)	Common Law
Minnesota	Hartman v. Cold Springs Granite Co., 243 Minn. 264, 67 N.W.2d 656 (1956); State Farm Mut. Auto Ins. Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36 (1963)	Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969)	Common Law
Mississippi	Simpson v. Poindexter, 241 Miss. 845, 133 So. 2d 286 (1961)	Tribble v. Gregory, 288 So. 2d 13 (Miss. 1974)	Legislation
Missouri		Novak v. Kansas City Transit Co., 365 S.W.2d 539 (Mo. 1963)	Common Law
Montana		Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961)	Common Law (federal court)

State	Denial of Wife's Claim	Recognition of Wife's Claim	Basis for Recognition
Nebraska		Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953)	Common Law (federal court)
Nevada		General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972)	Common Law
New Hampshire	Snodgrass v. Cherry-Burrell Corp., 103 N.H. 56, 164 A.2d 579 (1960)	Bromfield v. Seybolt Motors, Inc., 109 N.H. 501, 256 A.2d 151 (1969)	Legislation
New Jersey	Larocca v. American Chain & Cable Co., 23 N.J. Super. 195, 92 A.2d 811 (1952), *aff'd*, 12 N.J. 617, 97 A.2d 680 (1953)	Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965)	Common Law
New Mexico	Roseberry v. Starkovitch, 73 N.M. 211, 387 P.2d 321 (1963)		
New York	Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 151 N.E.2d 898, 167 N.Y.S.2d 354 (1958)	Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968)	Common Law
North Carolina	Not considered since 1950		
North Dakota	Not considered since 1950		
Ohio		Leffler v. Wiley, 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968); Clouston v. Remlinger Oldsmobile-Cadillac, Inc., 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970)	Common Law
Oklahoma	Nelson v. A.M. Lockett & Co., 206 Okla. 334, 243 P.2d 719 (1952); Karriman v. Orthopedic Clinic, 488 P.2d 1250 (Okla. 1971)		
Oregon		Smith v. Smith, 205 Or. 650, 287 P.2d 572 (1955)	Legislation

State	Denial of Wife's Claim	Recognition of Wife's Claim	Basis for Recognition
Pennsylvania	Brown v. Glenside Lumber & Coal Co., 429 Pa. 601, 240 A.2d 822 (1968); Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960)	Hopkins v. Blanco, 224 Pa. Super. 116, 302 A.2d 855 (1973)	State ERA
Rhode Island		Mariani v. Nanni, 95 R.I. 153, 185 A.2d 119 (1962)	Common Law
South Carolina	Page v. Winter, 240 S.C. 516, 113 S.E.2d 52 (1962)		
South Dakota		Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959)	Common Law
Tennessee	Rush v. Great Am. Ins. Co., 213 Tenn. 506, 376 S.W.2d 454 (1963)	Burroughs v. Jordan, 224 Tenn. 418, 465 S.W.2d 652 (1970)	Legislation
Texas	Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App. 1954)	Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978)	State ERA
Utah	Ellis v. Hathaway, 27 Utah 2d 143, 493 P.2d 985 (1972)		
Vermont	Baldwin v. State, 125 Vt. 317, 215 A.2d 492 (1965)		
Virginia	Carey v. Foster, 345 F.2d 772 (4th Cir. 1965)		
Washington	Ash. v. S.S. Mullen, Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953)	Lundgrens v. Whitney's, Inc., 94 Wash. 2d 91, 614 P.2d 1272 (1980)	State ERA
West Virginia	Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962)		
Wisconsin	Nickel v. Hardware Mut. Casualty Co., 269 Wis. 647, 70 N.W.2d 205 (1955)	Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967)	Common Law
Wyoming	Bates v. Donnafield, 481 P.2d 347 (Wyo. 1971)		

Table E

The "Tender Years" Doctrine in State Statutes and Appellate Case Law

KEY: D = Courts given discretion
TYD = Tender Years doctrine
GN = Gender-neutral statutes, prohibit consideration of sex of parent, "de-sexed" custody statute
BIC = Best interests of child
ERP = Equal rights for both parents
UMDA = Uniform Marriage and Divorce Act followed in whole or in part
UMDA + = precise and detailed statute based on UMDA

State	Statute	Activist Court	Gender-Activist Court	Case Law	Constitutional Rulings
Alabama	ERP[e1]	No	No	TYD a rebuttable presumption[e2]	TYD does not violate 14th Amendment, U.S. Constitution[e3]
Alaska (ERA 1971)	ERP, UMDA[e4]	Yes	Likely, few cases	Follows statute, TYD discarded[e5]	None[e6]
Arizona	BIC, UMDA +[e7]	No	No	Follows statute, TYD discarded[e8]	
Arkansas	BIC, UMDA[e9]	No	No	TYD subordinate to BIC[e10]	
California	ERP, UMDA[e11]	Yes	Yes	Follows statute, BIC even when statute stipulated TYD, TYD discarded[e12]	
Colorado (ERA 1972)	ERP, UMDA[e13]	No	No	Follows statute, TYD discarded[e14]	Sustained maternal award on grounds of insufficient evidence of sex discrimination[e15]
Connecticut (ERA 1974)	ERP, party not at fault given consideration, UMDA[e16]	No	Intermittently	TYD discarded, follows statute except for "not at fault" awards[e17]	None
Delaware	GN, UMDA +[e18]	No	No	Follows statute, TYD discarded[e19]	
Florida	ERP, UMDA +[e20]	Intermittently	Yes	TYD a facet of BIC,[e21] less rigid version of TYD consistent with statute	
Georgia	ERP, awards to party not at fault, UMDA[e22]	No	No	TYD discarded, follows statute except for "innocent party" stipulation[e23]	
Hawaii (ERA 1968)	ERP, UMDA[e24]	Yes	Few cases	TYD discarded, follows statute[e25]	None
Idaho	BIC, UMDA[e26]	No	No	TYD used as "tie breaker" although rejected by highest court[e27]	
Illinois (ERA 1971)	BIC, UMDA +[e28]	Intermittently	Yes	Majority of appellate court rulings have held that TYD violates state constitution[e29]	
Indiana	ERP, UMDA +[e30]	No	No	TYD discarded, follows statute[e31]	
Iowa	Rule of Civil Procedure 344(f)(15) takes precedence over D, UMDA[e32]	No	No	TYD discarded, highest court insists on meticulous case-by-case determinations by trial courts, commended for establishing precise guidelines to be followed in custody disputes[e33]	
Kansas	ERP, UMDA[e34]	No	No	Unsettled[e35]	

State	Statute	Activist Court	Gender-Activist Court	Case Law	Constitutional Rulings
Kentucky	BIC, ERP, UMDA +[e36]	No	No	TYD subordinate to BIC[e37]	
Louisiana (ERA 1974)	ERP, award to party "not at fault," UMDA[e38]	No	No	TYD subordinate to BIC[e39]	TYD sustained against state equal protection constitutional challenge[e40]
Maine	D[e41]	No	No	TYD discarded[e42]	
Maryland (ERA 1972)	ERP, UMDA[e43]	No	Yes	TYD subordinate to BIC until 1978[e44]	TYD held in violation of state constitution[e45]
Massachusetts (ERA 1976)	ERP[e46]	Intermittently	Yes	TYD discarded[e47]	None
Michigan	BIC, elaboration of UMDA with heavy emphasis on psychological factors[e48]	Yes	Likely	TYD discarded, follows statute[e49]	
Minnesota	GN, UMDA +[e50]	No	No	TYD used as "tie breaker"[e51]	Highest court held that TYD does not violate 14th Amendment of U.S. Constitution[e52]
Mississippi	D[e53]	No	No	TYD unless mother unfit[e54]	
Missouri	BIC[e55]	No	No	TYD subordinate to BIC[e56]	
Montana (ERA 1973)	BIC, UMDA +[e57]	No.	No	TYD a long-standing policy, used as "tie breaker"[e58]	None
Nebraska	BIC, GN, UMDA +[e59]	No	No	TYD discarded, strict adherence to statute, appellate courts commended for precise guidelines[e60]	
Nevada	BIC, GN[e61]	No	No	TYD probably subordinate to BIC[e62]	
New Hampshire (ERA 1975)	GN[e63]	No	Few cases	BIC, TYD may still persist[e64]	None
New Jersey	ERP (1976)[e65]	Yes	Intermittently	TYD subordinate to BIC[e66]	
New Mexico (ERA 1973)	BIC, UMDA[e67]	No	No	Unsettled, TYD may still persist although subordinate to BIC[e68]	None
New York	ERP, UMDA[e69]	Yes	Yes	TYD discarded, follows statute[e70]	Lower court has held that TYD violates 14th Amendment to U.S. Constitution[e71]
North Carolina	ERP, TYD discarded, UMDA[e72]	No	No	BIC[e73]	
North Dakota	BIC, D[e74]	No	No	TYD subordinate to BIC[e75]	
Ohio	UMDA, ERP[e76]	No	No	TYD discarded, except occasionally for girls; generally follows statute[e77]	
Oklahoma	Modified ERP, UMDA;[e78] mothers may have young children, but they may go to fathers when of an age for job or professional training	No	No	TYD subordinate to BIC although widely employed[e79]	Highest court held that TYD does not violate 14th Amendment of U.S. Constitution[e80]
Oregon	ERP, TYD discarded, UMDA[e81]	Intermittently	No	Unsettled[e82]	

State	Statute	Activist Court	Gender Activist Court	Case Law	Constitutional Rulings
Pennsylvania (ERA 1971)	BIC, UMDA[e83]	Yes	Yes	TYD discarded	Several appellate and supreme court rulings that TYD and any form of maternal preference violates state constitution[e84]
Rhode Island	BIC, UMDA[e85]	No	No	TYD subordinate to BIC[e86]	
South Carolina	ERP[e87]	No	No	BIC; TYD only one factor to consider[e88]	
South Dakota	ERP, UMDA[e89]	No	No	TYD used as "tie breaker"[e90]	
Tennessee	GN[e91]	No	No	TYD subordinate to BIC[e92]	
Texas (ERA 1972)	GN[e93]	No	Intermittently	TYD discarded, follows statute[e94]	None
Utah (ERA 1896)	BIC, D[e95]	No	No	TYD subordinate to BIC, although is employed as "tie breaker"[e96]	Highest court held that TYD does not violate 14th Amendment of U.S. Constitution[e97]
Vermont	BIC, UMDA +[1e98]	No	No	BIC predominates over parental rights, status of TYD unsettled[e99]	
Virginia (ERA 1971)	ERP, UMDA[e100]	No	No	TYD not an "inflexible rule," valid as "tie breaker" under state constitution[e101]	
Washington (ERA 1972)	ERP, UMDA[e102]	Yes	Yes	TYD probably discarded[e103]	None
West Virginia	BIC, GN[e104]	No	No	TYD subordinate to BIC[e105]	Highest court held that TYD does not violate 14th Amendment, U.S. Constitution[e106]
Wisconsin	GN, UMDA[e107]	Intermittently	Adheres to law that mandates sexual equality	TYD subordinate to BIC; TYD not inconsistent with GN statute[e108]	
Wyoming (ERA 1890)	GN, TYD discarded, UMDA[e109]	No	No	Unsettled, TYD may still persist as rebuttable presumption[e110]	None

Sources: B. BROWN, A. FREEDMAN, H. KATZ, & A. PRINCE, WOMEN'S RIGHTS AND THE LAW (1977); ERA IMPACT PROJECT CLEARINGHOUSE, INDEX AND REFERENCES (1980); Foster & Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, esp. Appendix, 343-63 (1978); Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 14 FAM. L.Q. 229 (1981); Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695 (1978); Miller, *Joint Custody*, 13 FAM. L.Q. 345 (1979); Ortner & Lewis, *Evidence of Single-Father Competence in Childrearing*, 12 FAM. L.Q. 27 (1979); Podell, Peck, & First, *Custody—to Which Parent?*, 13 FAM. L. NEWSLETTER 506, 512-17 (1973); Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. LAW 423 (1977); Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. REV. 473 (1979); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1333-38 (1980). Custody statutes were revised during the 1970's. Beginning in 1976, states began to adopt UMDA guidelines in significant numbers.

e1 ALA. CODE § 30-3-1 (1975). The statute formally provides for equal rights for both parents. Jones, *supra* note 157, at 702, claims that "without so stating," it implies a maternal preference for children under seven years.

e2 Skipper v. Skipper, 280 Ala. 506, 195 So. 2d 797 (1967); Linderman v. Linderman, 49 Ala. App. 662, 275 So. 2d 342 (1973); Turner v. Turner, 46 Ala. App. 350, 242 So. 2d 397 (1970).

e3 Thompson v. Thompson, 47 Ala. App. 57, 326 So. 2d 124 (1975), *cert. denied*, 295 Ala. 425, 326 So. 2d 129 (1976).
e4 ALASKA STAT. § 09.55.205 (Supp. 1980).
e5 King v. King, 477 P.2d 356 (Alaska 1970).
e6 Jones, *supra* note 157, at 703, lists the doctrine as a "tiebreaker" in Alaska. Foster & Freed, *supra* note 146, at 343, indicate that it is no longer employed. *See* Curgus v. Curgus, 514 P.2d 647 (Alaska 1973). Sheridan v. Sheridan, 466 P.2d 821 (Alaska 1970).
e7 ARIZ. REV. STAT. ANN. § 25-332 (Supp. 1981).
e8 Morales v. Glenn, 114 Ariz. 327, 560 P.2d 1234 (1977); Georgia v. Georgia, 27 Ariz. App. 271, 553 P.2d 1256 (1976); Porter v. Porter, 21 Ariz. App. 300, 518 P.2d 1017 (1974); Orezza v. Ramirez, 19 Ariz. App. 405, 507 P.2d 1017 (1973).
e9 ARK. STAT. ANN. § 34-2726 (Supp. 1981). Statute changed from UMDA to D (courts given discretion).
e10 Case law supports maternal preference according to age and sex of child. Weber v. Weber, 256 Ark. 549, 508 S.W.2d 725 (1974); Moore v. Smith, 255 Ark. 249, 499 S.W.2d 634 (1973); Qualls v. Qualls, 250 Ark. 328, 465 S.W.2d 110 (1971).
e11 CAL. CIV. CODE § 4600 (West Supp. 1978); maternal preference abolished, Act of Aug. 17, 1972, ch. 1007, § 1, 1972 Cal. Stat. 1854-55.
e12 *In re* Marriage of Urband, 68 Cal. App. 3d 796, 137 Cal. Rptr. 433 (1977); Russo v. Russo, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971).
e13 COLO. REV. STAT. § 14-10-124 (1973 & Supp. 1980).
e14 Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973).
e15 Menne v. Menne, 194 Colo. 304, 572 P.2d 472 (1977).
e16 CONN. GEN. STAT. ANN. § 466-56 (West Supp. 1980).
e17 Raymond v. Raymond, 165 Conn. 735, 345 A.2d 48 (1974); Skubas v. Skubas, 31 Conn. Supp. 340, 330 A.2d 105 (Conn. Super Ct. 1974).
e18 DEL. CODE ANN. tit. 13, § 722(b) (1981).
e19 Nelson v. Murray, 58 Del. 516, 211 A.2d 842 (1965).
e20 FLA. STAT. ANN. § 61.13(2) (West Supp. 1981).
e21 Bone v. Bone, 334 So. 2d 142 (Fla. Dist. Ct. App. 1976); Klavans v. Klavans, 330 So. 2d 811 (Fla. Dist. Ct. App. 1976); Snedaker v. Snedaker, 327 So. 2d 72 (Fla. Dist. Ct. App. 1976); Ross v. Ross, 321 So. 2d 443 (Fla. Dist. Ct. App. 1975) (sustained TYD despite equalizing statute).
e22 GA. CODE ANN. § 74-107 (Supp. 1978).
e23 Allsop v. Allsop, 236 Ga. 728, 225 S.E.2d 284 (1976); Todd v. Todd, 234 Ga. 156, 215 S.E.2d 4 (1975); Folsom v. Folsom, 228 Ga. 536, 186 S.E.2d 752 (1972). Georgia courts will not follow "innocent party" stipulation. Rigdon v. Rigdon, 226 Ga. 679, 151 S.E.2d 712 (1966).
e24 HAWAII REV. STAT. § 571-46 (1976 & Supp. 1981).
e25 Turoff v. Turoff, 56 Hawaii 51, 527 P.2d 1275 (1974).
e26 IDAHO CODE § 32-717 (Supp. 1981).
e27 This statute apparently has not been updated. Commentary on the case law is confusing. Jones, *supra* note 157, maintains that courts "refuse to consider" the TYD. *Id.* at 706 (citing Olson v. Olson, 47 Idaho 374, 276 P. 34 (1929)). On the other hand, Foster & Freed, *supra* note 146, maintain that TYD is only employed "where all other things are equal," *i.e.*, as a "tie breaker." *Id.* at 349 (citing Barrett v. Barrett, 94 Idaho 64, 480 P.2d 910 (1971)). In one case cited by Jones, *supra* note 157, the Idaho Supreme Court reversed a maternal award made because the mother, as mother, could best fulfill the maternal obligation. In Annest v. Annest, 96 Idaho 566, 532 P.2d 571 (1975), however, the Supreme Court reversed on the ground that the primary consideration was not the ability of the parents to fulfill their obligations, but the best interest of the child.
e28 Illinois Marriage and Divorce Act, § 602, ILL. ANN. STAT. ch. 40, § 640 (Smith-Hurd 1980).
e29 *See, e.g.*, Elmore v. Elmore, 46 Ill. App. 3d 504, 361 N.E.2d 615 (1977). Maternal preference was abandoned because of "recent social and legal trends" as well. Brady v. Brady, 26 Ill. App. 3d 131, 324 N.E.2d 645, 650 (1975). Two years later, the same court held that "unusual circumstances" could justify the use of the tender years doctrine. Rayburn v. Rayburn, 45 Ill. App. 3d 712, 360 N.E.2d 142 (1977). On the whole, however, Illnois courts no longer employ the doctrine. Foster & Freed, *supra* note 146, at 350, maintain that the doctrine was abandoned after the adoption of the state ERA.
e30 IND. CODE ANN. § 31-1-11.5-21 (West 1979).

e31 Schwartz v. Schwartz, 170 Ind. App. 241, 351 N.E.2d 900 (1976); Franks v. Franks, 163 Ind. App. 346, 323 N.E.2d 678 (1975); Leohr v. Leohr, 161 Ind. App. 514, 316 N.E.2d 400 (1974).

e32 IOWA CODE ANN. § 598.21 (West Supp. 1977-78); IOWA R. CIV. PROC. 344(f)15.

e33 Hobson v. Hobson, 248 N.W.2d 137 (Iowa 1976); *In re* Ferguson, 244 N.W.2d 817 (Iowa 1976); *In re* Marriage of Winter, 223 N.W.2d 165 (Iowa 1975); Blessing v. Blessing, 220 N.W.2d 599 (Iowa 1974); *In re* Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974) (TYD explicitly abandoned).

e34 KAN. STAT. ANN. § 60-1610(b) (Supp. 1980).

e35 According to both Jones, *supra* note 157, at 708-09, and Foster & Freed, *supra* note 146, at 351, the case law since the adoption of the 1977 amendment is unclear, and cases are in conflict. Prior to 1977, courts tended to use the TYD as a tie breaker. *See* Parrish v. Parrish, 220 Kan. 131, 551 P.2d 792 (1976); Patton v. Patton, 215 Kan. 377, 524 P.2d 709 (1974); Berry v. Berry, 215 Kan. 47, 523 P.2d 342 (1974); Dalton v. Dalton, 214 Kan. 805, 522 P.2d 378 (1974); St. Clair v. St. Clair, 211 Kan. 468, 507 P.2d 206 (1973); Moudy v. Moudy, 211 Kan. 213, 505 P.2d 764 (1973).

e36 KY. REV. STAT. ANN. § 403.070 (Bobbs-Merrill 1980).

e37 Although there is little case law that interprets the newly revised statute, courts have emphasized best interest as the "overriding issue." Evitson v. Evitson, 507 S.W.2d 153 (Ky. 1974). In Jones v. Jones, 577 S.W.2d 43 (Ky. 1979), maternal preference was rejected. *See also* Brown v. Brown, 510 S.W.2d 14 (Ky. 1974); Parker v. Parker, 467 S.W.2d 595 (Ky. 1971).

e38 LA. CIV. CODE ANN. art. 157(A) (West Supp. 1981).

e39 Crowe v. Crowe, 344 So. 2d 408 (La. Ct. App. 1977).

e40 Broussard v. Broussard, 320 So. 2d 236 (La. Ct. App. 1975).

e41 ME. REV. STAT. ANN. tit. 19, § 752 (Supp. 1981).

e42 The Maine Supreme Court has held that the best interest of the child must be paramount. Buzzell v. Buzzell, 235 A.2d 828 (Me. 1967). TYD was abandoned in Rousel v. State, 274 A.2d 909 (Me. 1971).

e43 MD. ANN. CODE art. 72A, § 1 (1978).

e44 There was case law sustaining TYD as a "tie breaker" until 1978. *See* Cooke v. Cooke, 21 Md. App. 376, 319 A.2d 841 (1974); Kirstukas v. Kirstukas, 14 Md. App. 190, 286 A.2d 535 (1972).

e45 McAndrew v. McAndrew, 39 Md. App. 1, 382 A.2d 1081 (1978).

e46 MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1980).

e47 Foster & Freed, *supra* note 146, at 353, maintain that there are no recent cases to indicate adherence or nonadherence to the statute, but that TYD is no longer in effect. Jones, *supra* note 157, at 711, maintains that the courts are guided by best interest (citing Masters v. Craddock, 4 Mass. App. Ct. 426, 351 N.E.2d 217 (1976)).

e48 MICH. COMP. LAWS ANN. §§ 722.25, 722.23 (Supp. 1980).

e49 Burghdoff v. Burghdoff, 66 Mich. App. 608, 239 N.W.2d 679 (1976); Zawisa v. Zawisa, 61 Mich. App. 1, 232 N.W.2d 275 (1975); Feldman v. Feldman, 55 Mich. App. 147, 222 N.W.2d 2 (1974); Pyle v. Pyle, 32 Mich. App. 361, 188 N.W.2d 641 (1971).

e50 MINN. STAT. ANN. § 518(17) (West Supp. 1981).

e51 Hoffman v. Hoffman, 303 Minn. 559, 227 N.W.2d 387 (1975); Erickson v. Erickson, 300 Minn. 559, 220 N.W.2d 487 (1974); Ryg v. Kerkow, 296 Minn. 265, 207 N.W.2d 701 (1973).

e52 Davis v. Davis, 306 Minn. 536, 235 N.W.2d 836 (1975), *cert. denied*, 426 U.S. 943 (1976).

e53 MISS. CODE ANN. § 93-5-23 (Supp. 1981).

e54 Case law leans toward BIC, but courts employ TYD unless the mother is unfit. Yates v. Yates, 284 So. 2d 46 (Miss. 1973); Sistrunk v. Sistrunk, 245 So. 2d 845 (Miss. 1971).

e55 MO. ANN. STAT. § 452.375 (Vernon 1977).

e56 Shannon v. Shannon, 550 S.W.2d 601 (Mo. Ct. App. 1977); Downing v. Downing, 537 S.W.2d 840 (Mo. Ct. App. 1976); *In re* W.K.M., 537 S.W.2d 183 (Mo. Ct. App. 1976); Rudloff v. Rudloff, 533 S.W.2d 688 (Mo. Ct. App. 1976); *In re* Marriage of Zigler, 529 S.W.2d 909 (Mo. Ct. App. 1975); Johnson v. Johnson, 526 S.W.2d 33 (Mo. Ct. App. 1975); L.D.H. v. T.P.H., 492 S.W.2d 857 (Mo. Ct. App. 1973).

e57 MONT. CODE ANN. § 332 (Supp. 1977).

e58 TYD is recognized as a long-standing policy, but is not controlling. *See* Lotton v. Lotton, 169 Mont. 223, 545 P.2d 643 (1976); Love v. Love, 166 Mont. 303, 533 P.2d 280 (1974).

e59 NEB. REV. STAT. § 42-364 (1978).

e60 Boroff v. Boroff, 197 Neb. 641, 250 N.W.2d 613 (1977); Knight v. Knight, 196 Neb. 63, 241 N.W.2d 360 (1976).
e61 NEV. REV. STAT. § 125.140 (1981).
e62 Nicols v. Nicols, 91 Nev. 479, 537 P.2d 1196 (1975); Culbertson v. Culbertson, 91 Nev. 230, 523 P.2d 768 (1975). Maternal preference was not recognized in Arnold v. Arnold, 95 Nev. 951, 604 P.2d 109 (1979).
e63 N.H. REV. STAT. ANN. § 458:17 (Supp. 1979).
e64 Del Pozzo v. Del Pozzo, 113 N.H. 436, 309 A.2d 151 (1973); Lemay v. Lemay, 109 N.H. 217, 247 A.2d 189 (1968).
e65 N.J. STAT. ANN. § 9:2-4 (West 1976).
e66 Mayer v. Mayer, 150 N.J. Super. 556, 376 A.2d 214 (N.J. Super. Ct. Ch. Div. 1977); Vannucchi v. Vannucchi, 113 N.J. Super. 40, 272 A.2d 560 (N.J. Super. Ct. App. Div. 1971).
e67 N.M. STAT. ANN. § 40-4-9 (1978).
e68 Jones, *supra* note 157, at 715, reports that case law is unsettled since adoption of the new law. Foster & Freed, *supra* note 146, at 357, note that TYD had been employed as a factor in making custody determinations. Csanyi v. Csanyi, 82 N.M. 411, 483 P.2d 292 (1971).
e69 N.Y. DOM. REL. LAW §§ 70, 240 (McKinney 1977 & Supp. 1981-82).
e70 Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973), held that TYD violates both the statute and the federal Constitution.
e71 *Id.*
e72 N.C. GEN. STAT. § 50-13.2 (Supp. 1981).
e73 Courts have employed BIC. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).
e74 N.D. CENT. CODE § 14-05-22 (1981).
e75 Jones, *supra* note 157, at 716, maintains that courts follow BIC (citing De Forest v. De Forest, 228 N.W.2d 919 (N.D. 1975)). Foster & Freed, *supra* note 146, at 358, maintain that TYD probably is used as a "tie breaker" (citing Ferguson v. Ferguson, 202 N.W.2d 760 (N.D. 1972)). *See also* Kottsick v. Carlson, 241 N.W.2d 842 (N.D. 1976); Matson v. Matson, 226 N.W.2d 659 (N.D. 1975); Silseth v. Levang, 214 N.W.2d 361 (N.D. 1974).
e76 OHIO REV. CODE ANN. §§ 3109.03, 3109.04 (Page 1980 & Supp. 1981).
e77 Jones, *supra* note 157, at 716, maintains that TYD still employed (citing Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974)), but Foster & Freed, *supra* note 146, at 339, maintain that it is not (citing McVay v. McVay, 44 Ohio App. 2d 370, 338 N.E.2d 772 (1974)).
e78 OKLA. STAT. ANN. tit. 30, § 11 (West 1976).
e79 Duncan v. Duncan, 449 P.2d 267 (Okla. 1969); Irwin v. Irwin, 416 P.2d 853 (Okla. 1966).
e80 Gordon v. Gordon, 577 P.2d 1271 (Okla), *cert. denied*, 439 U.S. 863 (1978).
e81 OR. REV. STAT. § 107.137 (1979-80).
e82 Foster & Freed, *supra* note 146, at 359, maintain that the law is unsettled. Ray v. Ray, 11 Or. App. 246, 502 P.2d 397 (1972); Deardoff v. Deardoff, 2 Or. App. 117, 467 P.2d 137 (1970). Jones, *supra* note 157, at 717, maintains that the courts are guided by the "best interest" standard and that TYD is no longer applied (citing *In re* Gaub, 25 Or. App. 107, 548 P.2d 179 (1976); Ray v. Ray, 11 Or. App. 246, 502 P.2d 397 (1972)).
e83 PA. STAT. ANN. tit. 48, § 92 (Purdon 1972).
e84 *E.g.*, Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977).
e85 R.I. GEN. LAWS § 15-5-16 (Supp. 1981).
e86 Foster & Freed, *supra* note 146, at 360, maintain that TYD still persists (citing Loebenberg v. Loebenberg, 85 R.I. 115, 127 A.2d 500 (1956)). Jones, *supra* note 157, at 718, maintains that BIC is the controlling factor despite recognition of TYD as a factor (citing Zinni v. Zinni, 103 R.I. 417, 238 A.2d 373 (1968); Loebenberg v. Loebenberg, 84 R.I. 115, 127 A.2d 500 (1956)).
e87 S.C. CODE ANN. §§ 20-3-160, 21-21-10 (Law. Coop. 1976).
e88 Jones v. Ard, 265 S.C. 423, 219 S.E.2d 358 (1975).
e89 S.D. CODIFIED LAWS ANN. § 25-5-7 (1976).
e90 Hershey v. Hershey, 85 S.D. 85, 177 N.W.2d 267 (1970); Yager v. Yager, 83 S.D. 315, 159 N.W.2d 125 (1968).
e91 TENN. CODE ANN. § 36-828 (Supp. 1981).
e92 Mollish v. Mollish, 494 S.W.2d 145 (Tenn. Ct. App. 1972).
e93 TEX. FAM. CODE ANN. § 14.01(b) (Vernon 1975).

e94 Tye v. Tye, 532 S.W.2d 124 (Tex. Civ. App. 1975); Erwin v. Erwin, 505 S.W.2d 370 (Tex. Civ. App. 1974).
e95 UTAH CODE ANN. § 30-3-10 (Supp. 1981). Courts are directed to make "equitable" custody orders. *Id.* at § 30-3-5(1) (Supp. 1981).
e96 The courts regard the maternal preference as important when all other things are equal, but cases indicate that courts are guided by BIC, not by a promaternal statutory presumption. *See* Jorgenson v. Jorgenson, 599 P.2d 510 (Utah 1979); Smith v. Smith, 564 P.2d 307 (Utah 1977); Rice v. Rice, 564 P.2d 305 (Utah 1977).
e97 Arends v. Arends, 30 Utah 2d 328, 517 P.2d 1019 (1973), *cert. denied*, 419 U.S. 881 (1974). In Cox v. Cox, 532 P.2d 994 (Utah 1975), however, the court ruled that under the state constitution mothers have no absolute right to custody.
e98 VT. STAT. ANN. tit. 15, §§ 292, 557 (1974).
e99 Savery v. Savery, 134 Vt. 391, 360 A.2d 58 (1976).
e100 VA. CODE § 20-107 (Supp. 1981).
e101 McCreery v. McCreery, 218 Va. 352, 237 S.E.2d 167 (1977).
e102 WASH. REV. CODE ANN. §§ 26.16.125, 26.09.190 (Supp. 1978).
e103 Foster & Freed, *supra* note 146, at 362, maintain that TYD is probably no longer in effect (citing Brauhn v. Brauhn, 10 Wash. App. 592, 518 P.2d 1089 (1974)). Jones, *supra* note 157, at 722, maintains that earlier cases indicate adherence to TYD (citing Barstad v. Barstad, 74 Wash. 2d 295, 444 P.2d 691 (1968)).
e104 W. VA. CODE § 48-2-15 (1980).
e105 Funkhouser v. Funkhouser, 216 S.E.2d 570 (W. Va. 1975).
e106 J.B. v. A.B., 242 S.E.2d 248 (W. Va. 1978).
e107 WIS. STAT. ANN. §§ 767.24(2), 766.15 (West 1981).
e108 Johnson v. Johnson, 78 Wis. 2d 137, 254 N.W.2d 198 (1977); Scolman v. Scolman, 66 Wis. 2d 761, 226 N.W.2d 388 (1975).
e109 WYO. STAT. § 20-2-113 (1977).
e110 Wilson v. Wilson, 473 P.2d 595 (Wyo. 1970); Butcher v. Butcher, 363 P.2d 923 (Wyo. 1961).

Table F

Status of the Tender Years Doctrine in "Little ERA" States[f1]

KEY: * = activist, gender-activist, or intermittently activist courts
ERP = statute provides for equal rights for both parents
GN = statute prohibits preference based on sex of parent
BIC = "best interest of the child," may include UMDA guidelines
TYD = tender years doctrine
D = courts given discretion

State	Doctrine Employed	Statute	Constitutional Ruling
Alaska*	No	ERP	No
Colorado	No	ERP	Maternal award sustained
Connecticut	No	ERP	No
Hawaii*	No	ERP	No
Illinois*	No	BIC	Yes
Louisiana	Yes	ERP	TYD sustained
Maryland*	No	ERP	Yes
Massachusetts*	No	ERP	No
Montana	Yes	BIC	No
New Hampshire	Possibly	GN	No
New Mexico	Possibly	BIC	No
Pennsylvania*	No	BIC	Yes
Texas	No	GN	No
Virginia	Yes	GN	TYD sustained
Utah	Yes	BIC, TYD discarded	TYD modified
Washington*	Probably not	BIC	No
Wyoming	Possibly	GN, TYD discarded	No

f1 The information in this table was compiled from Table E.

Table G

Status of "Tender Years" Doctrine in Non-ERA States[g1]

KEY:
- * = activist, gender-activist, or intermittently activist courts
- ERP = statute provides for equal rights for both parents
- GN = statute prohibits preference based on sex of parent
- BIC = "best interest of the child," may include UMDA guidelines
- TYD = tender years doctrine
- D = courts given discretion
- (?) = states in which doctrine possibly persists or law is unsettled

State	Doctrine Employed	Statute
Alabama	Yes	ERP
Arizona	No	BIC
Arkansas	Yes	BIC
California*	No	ERP
Delaware	No	GN
Florida*	Yes	ERP
Georgia	No	ERP
Idaho	Yes	BIC
Indiana	No	ERP
Iowa	No	BIC (court rules)
Kansas	(?)	ERP
Kentucky	Yes	BIC, ERP
Maine	No	D
Michigan*	No	BIC
Minnesota	Yes	GN
Mississippi	Yes	D
Missouri	Yes	BIC
Nebraska	No	BIC, GN
Nevada	(?)	BIC, GN
New Jersey*	Yes	ERP
New York*	No	ERP
North Carolina	No	ERP
North Dakota	Yes	BIC, D
Ohio	Yes	ERP

State	Doctrine Employed	Statute
Oklahoma	Yes	Modified ERP (see Table E)
Oregon*	(?)	ERP, TYD discarded
Rhode Island	Yes	BIC
South Carolina	Yes	ERP
South Dakota	Yes	ERP, TYD discarded
Tennessee	Yes	GN
Vermont	(?)	BIC
West Virginia	Yes	BIC, GN
Wisconsin	Yes	GN

gl The information in this table was compiled from Table E.

Table H

ERA and Non-ERA States That Retain "Tender Years Doctrine" Despite Statutes That Provide Equal Rights for Both Parents Or Prohibit Preference Based on Sex of Either Parent[h1]

KEY: * = activist or gender-activist courts
(?) = states in which doctrine possibly persists or law is unsettled

ERA States	Non-ERA States
Louisiana	Alabama
New Hampshire (?)	Florida*
New Mexico (?)	Kansas (?)
Utah	Kentucky
Virginia	Minnesota
Wyoming	New Jersey*
	Nevada (?)
	Ohio
	Oklahoma
	Oregon (?)*
	South Carolina
	South Dakota
	Tennessee
	West Virginia
	Wisconsin

h1 The information in this table was compiled from Table E.